80-644

No.

Supreme Court, U. S.
FILED
OCT 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G.D. SEARLE & COMPANY,

Petitioner,

vs.

SUSAN COHN and WALTER COHN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RAYMOND M. TIERNEY, JR.
SHANLEY & FISHER,
Attorneys for Petitioner,
550 Broad Street,
Newark, New Jersey 07102.
(201) 643-1220

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

Questions Presented

1. Whether the application of New Jersey's tolling statute, N.J.S.A. 2A:14-22, to petitioner, a foreign corporation amenable to suit in New Jersey, denies petitioner its right to due process under the Fourteenth Amendment to the United States Constitution.

2. Whether the application of New Jersey's tolling statute, N.J.S.A. 2A:14-22, to petitioner, a foreign corporation amenable to suit in New Jersey, denies petitioner its right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

3. Whether the application of New Jersey's tolling statute, N.J.S.A. 2A:14-22, to petitioner, a foreign corporation engaged solely in interstate and not intrastate commerce in New Jersey, constitutes the imposition of a burden of interstate commerce forbidden by the Commerce Clause of the United States Constitution.

Parties to the Proceedings*

Susan Cohn and Walter Cohn, Plaintiffs-Respondents.

G. D. Searle & Company, Petitioner-Defendant.

---

* The State of New Jersey is not a party to the within action. Neither the United States District Court for the District of New Jersey nor the United States Court of Appeals for the Third Circuit has certified to the Attorney General of the State of New Jersey the fact that the constitutionality of a statute of that state was drawn into question pursuant to the United States Supreme Court Rules, Rule 28. However, Petitioner herein has served notice upon the Attorney General of the State of New Jersey of the within matter and has notified him that 28 U.S.C. §2403(b) may be applicable. Additionally, the constitutionality of the same state statute was at issue in the case of *Velmohos* v. *Maren Engineering Corp.*, 168 N.J. Super. 520, 403 A.2d 927 (App. Div. 1979), *aff'd*, 83 N.J. 282, 416 A.2d 372 (1980). In that case the New Jersey Attorney General was notified of the fact that the constitutionality of the statute was at issue and he did not appear. 168 N.J. Super. at 522, 403 A.2d at 928.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	18

APPENDIX:

A—Opinion of the United States Court of Appeals for the Third Circuit	1a
B—Judgment of the United States Court of Appeals for the Third Circuit	26a
C—Opinion of the United States District Court for the District of New Jersey Re: Cohn v. G. D. Searle & Company	28a

PAGE

Table of Authorities

Cases Cited

Allenberg Cotton Co., Inc. v. Pittman, 419 U.S. 20 (1974) 13

Avdel Corporation v. Mecure, 58 N.J. 264, 277 A.2d 207 (1971) 9

Cohn v. G. D. Searle & Co., 447 F. Supp. 903 (D.N.J. 1978), *rev'd*, —— F.2d —— (Docket Nos. 79-2406 and 79-2605, 3rd Cir. July 23, 1980) 1, 2, 6, 7, 17

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) 13, 14

Heiner v. Donnan, 285 U.S. 312 (1932) 12

Hurwitch v. Adams, 52 Del. 13, 151 A.2d 286 (Super. Ct. Del.), *aff'd*, 52 Del. 247, 155 A.2d 591 (Del. 1959) 17

International Shoe Co. v. State of Washington, 326 U.S. 310 (1945) 8

International Textbook Co. v. Pigg, 217 U.S. 91 (1910) 13, 16

Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961) 14

Lochner v. New York, 198 U.S. 45 (1905) 11

Memphis Steam Laundry v. Stone, 342 U.S. 389 (1952) 14

Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980) 8

Richardson v. Belcher, 404 U.S. 78 (1971) 11

Reed v. Reed, 404 U.S. 71 (1971) 9, 10

Robbins v. Shelby Taxing District, 120 U.S. 489 (1887) 13, 14

PAGE

Royster Guano Company v. Virginia, 253 U.S. 412 (1920) 10

Shaffer v. Heitner, 433 U.S. 186 (1977) 8, 12

Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914) 13, 14

Velmohos v. Maren Engineering Corp., 168 N.J. Super. 520, 403 A.2d 927 (App. Div. 1979), *aff'd*, 83 N.J. 282, 416 A.2d 372 (1980) .....ii, 7, 8, 13

Vlandis v. Kline, 412 U.S. 441 (1973) 11

Will v. Malosky, 432 Pa. 246, 247 A.2d 788 (Pa. 1968) 17

World-Wide Volkswagen v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980) 8

United States Constitution Cited

Article 1, Section 8, Clause 3 3

Fourteenth Amendment ..... i, 2

Statutes Cited

28 U.S.C.:

Sec. 1254 (1) 2

Sec. 1332(a) 5

Sec. 1441 5

N.J.S.A. 2A:14-2 ..... 5, 6

N.J.S.A. 2A:14-22 .....i, 3, 6, 11

N.J.S.A. 14A:13-3 13

N.J.S.A. 54:10A-1 13

N.J.S.A. 54:10E-1 13

PAGE

Rules Cited

N.J.R. 4:2-2 ..... 10, 16

N.J.R. 4:4-4 4

N.J.R. 4:4-4(c)(1) 5, 9, 16

Other Authority Cited

Comment, "The Tolling Provision of the Statute of Limitations—A Haven for the Dilatory Plaintiff," 10 Seton Hall L. Rev. 585 (1980) 18

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G.D. SEARLE & COMPANY,

Petitioner,

vs.

SUSAN COHN and WALTER COHN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, G. D. Searle & Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Circuit Court of Appeals for the Third Circuit entered in this proceeding on July 23, 1980.

Opinions Below

Petitioner requests review of the decision of the United States Court of Appeals for the Third Circuit (Third Circuit) reported sub nom. *Cohn* v. *G. D. Searle & Co.* ——

F.2d —— (Docket Nos. 79-2405 & 79-2406, 3rd Cir. July 23, 1980). The opinion is reproduced in the Appendix at p. 1a, *infra.*

The decision of the United States District Court for the District of New Jersey appears at 447 F. Supp. 903 (D. N.J. 1978). It is included in the Appendix at p. 28a, *infra.*

Jurisdiction

The judgment of the Third Circuit was entered on July 23, 1980.[1] A copy of that judgment is included in the Appendix at p. 26a, *infra.* This petition for certiorari has been filed within 90 days of the date of said judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), which states:

> "cases in the courts of appeals may be reviewed by the Supreme Court . . .
>
> (1) By-writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . ."

Constitutional Provisions, Statutes and Rules Involved

The Fourteenth Amendment to the United States Constitution, Section 1:

---

[1] The within matter had been consolidated and decided by the Third Circuit in conjunction with the case of *Hopkins* v. *Kelsey-Hayes, Inc.* (Docket No. 79-1881, 3rd Cir. July 23, 1980). The defendant in that case has also petitioned this Court for the issuance of a writ of certiorari.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the United States, Art. 1, §8, Cl. 3 (the Commerce Clause):

> "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ..."

The New Jersey "Tolling Statute", N.J.S.A. 2A:14-22:

> "If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said section, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or cor-

porate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation."

New Jersey's Long-Arm Rule, N.J.R. 4:4-4:

"Service of summons, writs and complaints shall be made as folows:

• • •

(c) Corporations, Partnerships, and Associations.

(1) Corporations. Upon a domestic or foreign corportaion, by serving, in the manner prescribed, in paragraph (a), either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowlledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or

> certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office."

New Jersey's Statute of Limitations for Personal Injury Actions, N.J.S.A. 2A:14-2:

> "Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued."

Statement of the Case

This is a products liability/negligence action brought by Mrs. Cohn, a user of the oral contraceptive, Enovid, and her husband against its manufacturer, G. D. Searle & Company (Searle). Mrs. Cohn's use of Enovid allegedly resulted in a cerebrovascular accident which she suffered in 1964. Sometime in 1969 or 1970, the plaintiffs became aware of a possible link between Mrs. Cohn's stroke and her ingestion of Enovid, and, although not at issue in this Petition, the District Court in an unpublished opinion concluded that plaintiffs had discovered their cause of action by 1970.

Plaintiffs commenced this action in 1974 by the filing of a complaint in the Superior Court of New Jersey. Service was effected on Searle under New Jersey's long arm rule, N.J.R. 4:4-4(c)(1). No difficulty in obtaining the name of Searle or in effecting service was claimed. Searle removed the case to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. §1441, invoking the diversity of citizenship jurisdiction of that Court under 28 U.S.C. §1332(a).

Searle thereafter moved for summary judgment on the ground that plaintiffs' claims were barred by the applicable two-year statute of limitations, N.J.S.A. 2A:14-2. In opposition, plaintiffs argued that the statute of limitations was no bar to their complaint because New Jersey's tolling statute, N.J.S.A. 2A:14-22, tolls the statute of limitations in any action against a foreign corporation, such as Searle, which is not represented in this state by any person or officer upon whom summons or other original process may be served.

Searle, a Delaware corporation with its principal place of business in Illinois, conducted an entirely interstate and not intrastate pharmaceutical business in New Jersey. Accordingly, Searle argued, *inter alia,* that the tolling statute did not apply to it since it was amenable to valid long-arm service of process. Alternatively, Searle argued that if the tolling statute were applicable to it, its rights of equal protection and due process guaranteed by the Fourteenth Amendment to the United States Constitution were violated.

The District Court, whose opinion appears at 447 F. Supp. 903 (D.N.J. 1978) and is included in the Appendix at p. 28a, held that the tolling statute applied to Searle. It also held, however, that such an application to a foreign corportaion amenable to service of process under the long-arm rule served no rational purpose and was, therefore, an unconstitutional denial of equal protection. The District Court opinion further stated that if the tolling statute was designed to compel foreign corporations to do business in New Jersey, it also imposed an unlawful burden on interstate commerce under the Commerce Clause. 477 F.Supp. at 911, n.17.

On appeal to the Third Circuit, Searle argued that the application of the tolling provision violated both equal

protection and due process of law, and further, when applied to a corporation engaged solely in interstate commerce, violated the Commerce Clause.

Just prior to the Third Circuit's consideration of the *Cohn* matter, the New Jersey Supreme Court rendered its decision in *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980). In that opinion, New Jersey's highest court rejected a foreign corporation's constitutional claims of violation of due process and equal protection by denying it the defense of the statute of limitations although it was at all times subject to the State's jurisdiction. Thus, under *Velmohos*, an unregistered and unlicensed foreign corporation might never assert such a defense. It should be noted that Maren Engineering Corporation has docketed an appeal and has filed a Jurisdictional Statement in that matter with this Court.

The Third Circuit in *Cohn*, following the approach chosen by New Jersey's highest court, reversed the District Court and concluded that the application of the tolling statute to foreign corporations amenable to long-arm jurisdiction, such as Searle, did not deny equal protection or due process. *Searle's Commerce Clause arguments were not addressed.*

Reasons for Granting the Writ

The question of whether a state may subject a foreign corporation, admittedly not registered to do business in that state, to its *in personam* jurisdiction while at the same time denying to that corporation the protection of a statute of limitations afforded all other defendants subject to the state's jurisdiction, consistent with due process and equal protection of the law, is a substanstantial and novel one. Further, the question of whether a state may condition the

implementation of a valid statute of limitations defense by a foreign corporation, engaged solely in interstate commerce, yet subject to that state's *in personam* jurisdiction under its long-arm rule, by compelling qualification to do business in that state with attendant tax and reporting burdens, consistent with the Commerce Clause, is a substantial and novel one. These important questions of federal law have not been, but should be, addressed by this Court. The New Jersey Supreme Court's decision in *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980), and the Third Circuit's adoption of that decision in the instant case causes confusion within the Circuit and conflicts with the opinions of other state courts of last resort. These considerations require that this Court exercise its discretion and grant a writ of certiorari in this case.

This Court has limited the reach of out-of-state service of process by requiring sufficient minimum contacts with a state so that a suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 316 (1945). In *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286, 100 S. Ct. 559, 567; 62 L.Ed. 2d 490 (1980), this Court described these limitations more concretely. Under the Due Process Clause, it is not unreasonable for a state to subject a foreign corporation to its jurisdiction "if the sale of a product of a manufacturer . . . [arose] from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other states. . . ." *See also, Oswalt* v. *Scripto, Inc.*, 616 F.2d 191, 198-199 (5th Cir. 1980).

In *Shaffer* v. *Heitner*, 433 U.S. 186, 202 (1977), this Court recognized that a foreign corporation doing business in a state could be deemed "present" in that state, and thus subject to service of process. Mr. Justice Marshall wrote for the Court:

> "This basis for *in personam* jurisdiction over foreign corporations was later supplemented by the doctrine that a corporation doing business in the state could be deemed 'present' in the State. . . ."

Concomitantly, the New Jersey long-arm rule, N.J.R. 4:4-4 (c)(1), permits service of process upon nonresident defendants "to the uttermost limits permitted by the United States Constitution." *Avdel Corporation* v. *Mecure*, 58 N.J. 264, 268, 277 A.2d 207, 209 (1971).

Once New Jersey has determined a foreign corporation to be sufficiently "present" in the state to be amenable to its service of process, it must follow that such a foreign corporation should be afforded the right to plead the defense of the statute of limitations—a defense available to domestic corporations and to other foreign corporations also amenable to service through long-arm jurisdiction but who by chance may also maintain registered agents within the State. Yet in the instant case the Third Circuit has determined that the petitioner corporation was not sufficiently "present" to avail itself of the two-year statute of limitations. By doing so, the Third Circuit has concluded that the statute of limitations will never be available to such a defendant. This novel decision deprives petitioner of its Constitutional rights to due process and equal protection of the law. Such a decision requires review and reversal by this Court.

The purpose of the Equal Protection Clause of the United States Constitution is to prevent irrational and arbitrary discrimination between persons similarly situated. *Reed* v. *Reed*, 404 U.S. 71 (1971). While a state may make rational classifications, a state may not provide that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated

to the objective of that statute. *Reed* v. *Reed,* 404 U.S. at 75-76.

New Jersey's distinction, as applied by the Third Circuit, between petitioner and other foreign corporations, which for business or other considerations may be qualified to do business and maintain a registered agent or be licensed by New Jersey, is arbitrary and has no rational basis. Indeed, plaintiffs never asserted any difficulty in serving Searle. Yet, despite plaintiffs' ease in service of process, Searle is forever barred from asserting the defense of the statute of limitations. Such a discriminatory result falls within the rule of *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920), that a classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike." *Accord, Reed* v. *Reed,* 404 U.S. at 76.

Essentially, the rationale of the Third Circuit focused on the presumed difficulties in serving out-of-state defendants. Such reasoning, however, is irrational both on its face and as applied. In New Jersey, the filing of a complaint, naming any defendant, whether in-state or out-of-state, and not the time of service of process, tolls the statute of limitations against all so named. N.J.R. 4:2-2. In focusing on the rule's requirement that plaintiffs attempt in-state service before utilizing long-arm service, the Third Circuit has given judicial approbation to the irrational result of forever precluding the assertion of the statute of limitations by the long-arm defendant, regardless of when the defendant was served or when the complaint was filed —here, at least four years after the cause of action accrued.

If the expressed reason for tolling the statute of limitations for foreign corporations which are not represented within New Jersey is difficulty in effecting service, then

the equal protection clause demands that the length of time that the statute is tolled bear a rational relation to that difficulty. Yet, despite these constitutional requirements, N.J.S.A. 2A:14-22 evinces no relation between the ease or difficulty of service of process upon an out-of-state defendant and the availability of the defense of the statute of limitations to such defendant. As such, it remains arbitrary, bearing no rational relationship to the legislative objective sought to be obtained, and, therefore, is constitutionally infirm.

The Due Process Clause of the United States Constitution similarly demands that the use of state power bear a rational relationship to a legitimate societal interest. *Richardson* v. *Belcher,* 404 U.S. 78, 81 (1971); *Lochner* v. *New York,* 198 U.S. 45, 53 (1905). As the long-arm provision extends the state's reach to out-of-state corporations, the legitimate state interest in denying a distant corporation the benefit of its statute of limitations is correspondingly diminished. N.J.S.A. 2A:14-22, as construed by the courts below, conclusively presumes that foreign corporations without representation in New Jersey are not amenable to service. This presumption, plainly contradicted by the appearance of long-arm defendants, is irrational and is a deprivation of due process of law.

"Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis* v. *Kline,* 412 U.S. 441, 446 (1973). In *Vlandis,* the state's presumption that an out-of-state student would forever remain an out-of-state resident during the course of study at a Connecticut college was stricken as a denial of due process of law. This presumption financially penalized the plaintiffs in *Vlandis.* By the same token, the Third Circuit's adoption of New Jersey's irrebutable presumption,

as expressed in its 1949 tolling statute, that all out-of-state defendants are not subject to service of process despite their appearance in an action, is also invalid. "[A] statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Heiner* v. *Donnan*, 285 U.S. 312, 329 (1932).

The decision of the Third Circuit upholding the constitutional viability of the 1949 tolling statute as applied to long-arm defendants perpetuates a form of discrimination against foreign corporations engaged in interstate commerce that involves not only equal protection and due process, but, of equal importance, Commerce Clause considerations intertwined with the concepts of fundamental fairness and justice. Under not totally dissimilar circumstances this Court has noted:

> "'[T]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." *Shaffer* v. *Heitner*, 433 U.S. 186, 212 (1977).

The effect of the Third Circuit's opinion in upholding the application of the tolling statute to Searle is to burden unconstitutionally Searle's conduct of interstate business operations.[2] The only mechanism available to Searle to avoid perpetual exposure to stale claims by dilatory plaintiffs in New Jersey is to qualify as a corporation authorized to do business within this state, and thus subject itself to the requirements of not only designating a registered agent, but

---

[2] As indicated earlier, the Third Circuit ignored the Commerce Clause argument raised on appeal.

of maintaining an office, complying with various filing and reporting requirements and subjecting itself to state taxation. *E.g.*, N.J.S.A. 14A:13-3 *et seq.*; N.J.S.A. 54:10A-1 *et seq.*; N.J.S.A. 54:10E-1 *et seq.* Such requirements impose upon a foreign corporation engaged totally in interstate commerce an unfair burden not countenanced by this Court's interpretations of the Commerce Clause.[3]

In a series of cases beginning almost 100 year ago with the "drummer" cases and continuing to date, this Court has summarily struck down similar burdens imposed by states on foreign corporations engaged in interstate commerce. *Allenberg Cotton Co., Inc.* v. *Pittman*, 419 U.S. 20 (1974); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197 (1914); *International Textbook Co.* v. *Pigg*, 217 U.S. 91 (1910); *Robbins* v. *Shelby Taxing District*, 120 U.S. 489 (1887). As stated in *Dahnke-Walker Milling Co.* v. *Bondurant*:

> "A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs

---

[3] In *Velmohos* v. *Maren Engineering Corp.*, the New Jersey Supreme Court suggested, in a footnote, that "whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State." 83 N.J. at 293, n.10. *This is simply not so.* Ludicrous as it may appear, there is no method to simply designate an agent for service of process. In order to have an agent for service of process in New Jersey, a foreign corporation must qualify to do business in the state. There is no statutory authority or procedure for designating an agent for service of process independently of or without qualifying the corporation to do business. Qualification and the designation of an agent in turn trigger reporting requirements of business activities annnually and the imposition of a franchise tax liability.

> or lays a burden on the exercise of this privilege is void under the commerce clause." 257 U.S. at 291.

In *Robbins* v. *Shelby Taxing District,* the Court ruled that "the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." 120 U.S. at 497. *See,* also, *Memphis Steam Laundry* v. *Stone,* 342 U.S. 389, 392, n. 7 (1952); *Sioux Remedy Co.* v. *Cope,* 235 U.S. 197 (1914); *Lilly & Co.* v. *Sav-On-Drugs, Inc.,* 366 U.S.276 (1961).

It is well established that neither the filing of a charter, the appointment of an agent to receive process nor the payment of a fee may be required of a corporation involved in a state solely in interstate commerce as a prerequisite to the bringing of suit in that state's court to enforce a claim arising out of interstate commerce. As this Court stated in *Lilly & Co.* v. *Sav-On-Drugs, Inc.*:

> "Under the authority of the so-called 'drummer' cases, such as *Robbins* v. *Shelby County Taxing Dist.,* Lilly is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State." 366 U.S. at 278-279.

And as this Court previously enunciated in *Sioux Remedy Co.* v. *Cope*:

> "We think that when a corporation goes into a State other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the State cannot, consistently with the limitations arising from the

commerce clause, obstruct or hamper the attainment of that purpose. *If it were otherwise, the purpose of the Constitution to secure and maintain the freedom of commerce by whomsoever conducted could be largely thwarted by the States and the commerce itself seriously crippled.*

* * *

The conditions which the statute imposes are: First, that the company shall file in the office of the Secretary of State an authenticated copy of its charter or articles of incorporation; *second, that it shall appoint a resident agent upon whom process may be served in any action against it* * * * *The second one, respecting the appointment of a resident agent upon whom process may be served, is particularly burdensome, because, as the Supreme Court of the State has said, it requires the corporation to subject itself to the jurisdiction of the courts of the State in general as a prerequisite to suing in any of them; that is to say, it withholds the right to sue even in a single instance until the corporation renders itself amendable to suit in all the courts of the State by whosoever chooses to sue it there. If one State can impose such a condition others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce.* As applied to such rights we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause." 235 U.S. at 204-205. (Emphasis supplied).

In the instant case, the tolling statute deprives Searle, a foreign corporation involved in New Jersey only in inter-

state commerce, of the benefit of the statute of limitations unless Searle takes certain otherwise unnecessary acts, such as registering to do business in New Jersey and designating an agent, or maintaining an office or manager in this state. In effect, every foreign corporation transacting business in interstate commerce in New Jersey must now take some affirmative act or be denied the benefit of the statute of limitations. While the intent of the tolling statute may not have been to impose such unconstitutional requirements, the practical effect of the statute does just that. *International Textbook Co.* v. *Pigg*, 217 U.S. at 110-111. Such a result is totally incompatible with the Commerce Clause. Since Searle is engaged totally in interstate and not intrastate commerce in New Jersey, this Court should now hold that New Jersey cannot so condition Searle's effective defense of suits in New Jersey courts arising unavoidably from that interstate commerce.

This is especially true considering that New Jersey has already provided plaintiffs with an available alternative to the tolling statute in its long-arm rule, N.J.R. 4:4-4(c)(1), read in conjunction with N.J.R. 4:2-2. As mentioned above, a New Jersey action is commenced by the filing of the complaint, thereby tolling the statute of limitations. Thus, a New Jersey plaintiff can commence an action within the limitations period by filing his complaint and search for the out-of-state defendant later. Upon a *pro forma* showing that the out-of-state corporation cannot be served in New Jersey, he may then have the summons and complaint mailed under the long-arm rule. Such an alternative provides ease of service for the plaintiff and at the same time protects defendants from stale claims. It accordingly imposes no burden on interstate commerce.

In sum, measured by any standard, this Court should hold that the tolling statute places on Searle's conduct of its in-

terstate business a burden which is unlawful under the Commerce Clause.

The New Jersey Supreme Court's unequal treatment of foreign corporations subject to long-arm jurisdiction and the Third Circuit's adoption of that treatment has resulted in unequal results throughout the Third Circuit.

Within the Third Circuit, Delaware and Pennsylvania have statutes which toll the statute of limitations for non-resident defendants. However, the highest courts of both Delaware and Pennsylvania have ruled that where the defendant, although a non-resident, is amenable to service and thus subject to the state's jurisdiction, the tolling statute is inapplicable. *See e.g., Hurwitch* v. *Adams,* 52 Del. 13, 151 A.2d 286 (Super. Ct. Del.), *aff'd,* 52 Del. 247, 155 A.2d 591 (Del. 1959); *Will* v. *Malosky,* 432 Pa. 246, 247 A.2d 788 (1968). Yet, the Third Circuit has denied to Searle the same privileges afforded to others in the Circuit.

The Third Circuit's reversal of the District Court's decision in *Cohn* was in error. It has cogently been observed:

> "Under the current statutory framework, a plaintiff maintaining an action against a nonresident has the option to proceed or postpone; the defendant is conclusively denied the right to interpose the defense of the statute of limitations. Through the plaintiff's utilization of long-arm procedures, in addition to deriving the benefit of the suspension of the limitation period, the nonresident defendant may be continually subject to the jurisdiction of the New Jersey courts while remaining totally unaware that an injured party is contemplating suit. The operation of the tolling provision poses a severe hardship to nonresidents in preparing an adequate defense, creates an irrational classification in regard to nonresident de-

fendants amenable to service of process, and flaunts the purpose and intent of the statute of limitations." Comment, "The Tolling Provision of the Statute of Limitations—A Haven for the Dilatory Plaintiff", 10 Seton Hall L. Rev. 585, 586 (1980).

It is respectfully submitted that the judgment of the Third Circuit is constitutionally infirm.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court issue a writ of certiorari to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

By: Raymond M. Tierney, Jr.
Shanley & Fisher,
Attorneys for Petitioner,
550 Broad Street,
Newark, New Jersey 07102.
(201) 643-1220

Dated: October 20, 1980

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

(Filed: July 23, 1980)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1881

ROY HOPKINS,

Appellee,

v.

KELSEY-HAYES, INC.,

Appellant.

Nos. 79-2406 and 79-2605

SUSAN COHN and WALTER COHN, her husband,

Appellants in No. 79-2406,
Cross-Appellee in No. 79-2405,

v.

G. D. SEARLE & COMPANY,

Appellee in No. 79-2406,
Cross-Appellant in No. 79-2405.

Appendix A

APPEALS FROM THE UNITED STATES DISTRICT COURT
FJR THE DISTRICT OF NEW JERSEY

D.C. Civil Nos. 78-1646 and 74-0450)

Argued: February 11, 1980.

Before: ADAMS, GARTH and VAN DUSEN, Circuit Judges.

APELL, HOWARD AND MATHEWS
J. LLEWELLYN MATHEWS (Argued)
P.O. Box 95
Browns Mills, N.J. 08015

Attorneys for Appellee (79-1881)

SHANLEY & FISHER
RAYMOND M. TIERNEY, JR., (Argued)
ABBOTT S BROWN
550 Broad Street
Newark, N.J. 07102

Attorneys for Appellee,
Cross-Appellant (79-2406 and 2605)

RAWLE & HENDERSON
LOWELL A. REED, JR. (Argued)
2100 Packard Building
Philadelphia, PA 19102

Attorneys for Appellant (79-1881)

Appendix A

WALTER R. COHN, (Argued)
ELAINE HARRIS
15 Valley Street
South Orange, N.J. 07079

Attorneys for Appellants
(79-2406 and 2605)

OPINION OF THE COURT

GARTH, *Circuit Judge.*

These appeals[1] present up with constitutional challenges to a New Jersey statute, N.J.S.A. §2A:14-22, which tolls the statute of limitations in actions against foreign corporations which are not represented in New Jersey, but which may nonetheless be amenable to New Jersey's long-arm jurisdiction. By contrast, foreign corporations which are represented in New Jersey receive the full benefit of all limitations statutes. Thus, the defendants here, both non-represented foreign corporations, claim that N.J.S.A. §2A:14-22, by refusing them the protection of the limitation statute, has denied them due process and equal protection of the laws under the United States constitution.

We do not agree, as we conclude that the New Jersey statute is not irrational. Thus, we will not disturb New Jersey's legislative enactment, which we hold satisfies constitutional standards.

---

[1] Although these cases were tried separately before two different district court judges, because they involve identical challenges to the constitutionality of a New Jersey statute, N.J.S.A. §2A:14-22, we consolidated them for the purpose of oral argument and disposition.

Appendix A

I.

A.

In the first of these appeals, *Cohn* v. *D. D. Searle & Co.*, the plaintiffs, who are husband and wife, sued G. D. Searle & Co. (herinafter "Searle") in tort for damages caused by a birth control pill, Enovid, which had been manufactured by Searle and which allegedly contributed to a stroke suffered by Mrs. Cohn. Searle is a Delaware corporation with its principal place of business in Illinois. Although it was at all times subject to New Jersey's long-arm jurisdiction, *see* N.J. Ct. R. 4:4-4(c)(1),[2] Searle was not registered to do business in New Jersey, and it maintained no agent for service of process in New Jersey. In fact, the only personnel affiliated with Searle who were located in New Jersey, during the time period relevant to this litigation, were 40 so-called "detail-persons" who worked out of their own homes and whose sole function was to generate good-will for Searle among New Jersey doctors.

Before trial, Searle claimed the benefit of New Jersey's two year statute of limitations as a defense. N.J.S.A. §2A:

---

[2] Rule 4:4-4(c)(1) permits long-arm service upon out-of-state corporations in the following circumstance:

> If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing [methods for service within the state] and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

14-2[3] In response, the plaintiff claimed that the statute of limitations was no bar to their complaint because N.J.S.A. §2A:14-22 (hereinafter the "tolling provision") tolls the limitations statute in any action against a foreign corporation which "is not represented in this state by any person or officer upon whom summons or other original process may be served. . . ."[4]

---

[3] N.J.S.A. §2A:14-2 provides:

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

[4] N.J.S.A. §2A:14-22 provides in relevant part:

> If any person against whom there is any of the causes of action specified . . . is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, *or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served,* when such cause of action accrues or at any time before the expiration of the times so limited, *the time or times during which* such person or surety is not residing within this state or *such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section.* The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or

(Footnote continued on following page)

With the issue thus framed, and conceding that no facts were in dispute, Searle then moved for summary judgment, asserting that the Cohns' claim was barred by the statute of limitations. Searle argued that the tolling provision was not applicable in this case because Searle was "represented" in New Jersey by its detail-persons. Alternatively, Searle contended that the tolling provision, if applicable to it, could not pass muster under the equal protection clause of the United States constitution in that it drew an arbitrary and irrational distinction between foreign corporations represented in New Jersey and foreign corporations not so represented, but which were nevertheless subject to New Jersey's long-arm jurisdiction.

The district court rejected Searle's argument that the presence of detail-persons in New Jersey afforded Searle the benefit of the statute of limitations. On the other hand, the district court accepted Searle's contention that the tolling provision was unconstitutional. 447 F. Supp. 903 (D. N.J. 1978). Reasoning that the tolling provision must be interpreted in light of the legislative intent at the *time of*

(Footnote continued from preceding page)

times of nonresidence or nonrepresentation. (emphasis added).

Plaintiffs claimed, alternatively, that the statute of limitations was tolled by N.J.S.A. §2A:14-21 which stops the running of the limitations period against persons who are "insane" when their causes of action accrue. In an unpublished opinion, the district court found that on this record, plaintiff's condition did not constitute insanity within the meaning of N.J.S.A. §2A:14-21. Consequently, the district court rejected this alternative argument. In light of our conclusion, *see infra*, that N.J.S.A. §2A:14-22 tolled the running of the limitations statute in this case, we need not, and do not, reach the merits of this contention.

its enactment, the court held that Searle's detail-persons were not adequate corporate "representatives" within the meaning of the tolling provision inasmuch as, as the time that provision was most recently amended, in 1949,[5] juris-

---

[5] As the New Jersey Supreme Court has noted, the roots of the tolling provision are traceable as far back as 1820. *See Lempke* v. *Bailey*, 41 N.J. 295, 196 A.2d 523 (1963). In its original form, and up until 1949, however, the tolling provision made no specific reference to corporations. *Id.* (citing Pennington, *Laws of New Jersey, 1703-1820* at 670 (1821). As of 1949, the tolling provision, which thus denied both represented and non-represented foreign corporations the benefits of New Jersey's statutes of limitations, read as follows:

> If any person against whom there is or may be a cause of action specified in sections 2:24-1, 2:24-2, 2:24-3, 2:24-5, 2:24-6, 2:4-16 or 2:24-17 of this title is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, the time or times during which such person is not residing within this state shall not be computed as a part of the periods of time within which such actions are required to be commenced by said sections; and the person entitled to any such action may commence the same after the accrual of the cause thereof, within the periods of time limited therefor by said sections, exclusive of such time or times of non-residence.

N.J.R.S. §2:24-7.

In 1949, the tolling provision was amended to its present form, referring, for the first time, to corporations "*represented in this state* by any person or officer upon whom summons or other original process may be served." Act of May 18, 1949, 1949 N.J. Laws, ch. 125 (amending N.J.R.S. §2:24-7) (1937)) (currently codified at N.J.S.A. §2A:14-22) (emphasis added). The legis-

(Footnote continued on following page)

diction could be obtained over a foreign corporation only by serving, within New Jersey, an "officer, director, trustee or a managing or general agent of the corporation."[6] *In*

(Footnote continued from preceding page)

lative statement accompanying the 1949 amendments to the tolling provision explained this provision as follows:

> Foreign corporations licensed to do business in New Jersey are now deprived by judicial construction of the benefit of the statute of limitations. The purpose of this bill is to correct that situation. New York State found it necessary to make a similar change in its law in view of recent court decisions.
>
> The New York tolling law which is referred to in the legislative statement was N.Y.C.P.A. §19, which had been amended in 1943 so as to include as beneficiaries of the New York statutes of limitations, foreign corporations with "one or more officers or other persons in the state on whom a summons for such corporation may be served." Act of April 3, 1943, 1943 N.Y. Laws, ch. 263.

[6] In 1949, the New Jersey rules governing service of process on corporations were as follows:

> *N.J.R.S. §2:26-43. Domestic corporations in personal action, personal or substituted service summons.*
>
> Service of a summons in a civil action commenced against a domestic corporation in any of the courts of this State may be made by delivering a copy hereof to an officer, director, trustee or a managing or general agent of the corporation personally, or by leaving a copy thereof at his dwelling house or usual place of abode with some competent member of his family of the age of fourteen years or over then residing therein, or by delivering a copy thereof

(Footnote continued on following page)

personam jurisdiction over Searle, therefore, could not have been obtained by service on mere detail-persons. 447 F. Supp. at 909-10.

Having disposed of this statutory issue, the district court then turned to Searle's constitutional claims. The court observed that the purpose of the tolling provision, when it was originally enacted and as it was subsequently amended, *see* note 5 *supra*, was to protect New Jersey plaintiffs asserting causes of action against corporate defendants which were not subject to *in personam* jurisdiction in the New Jersey courts. In light of this purpose, the court concluded that the tolling provision was no longer relevant in cases where the out-of-state defendant was now subject to the long-arm jurisdiction of the New Jersey courts—a jurisdictional expansion which, in

---

(Footnote continued from preceding page)

to any person authorized by appointment or by law to receive service of process on behalf of the corporation, or by leaving a copy thereof at the registered office of the corporation with any person in charge thereof.

N.J.R.S. §*2:26-44. Foreign corporations.*

Service of a summons in a civil action commenced against a foreign corporation may be made in the same manner as is provided in section 2:26-43 of the Revised statutes for service of summons upon a domestic corporation.

New Jersey's rule for long arm service was not promulgated until 1958, N.J. Ct. R.R. 4:4-4(d) (effective September 3, 1958) (presently N.J. Ct. R. 4:4-4(c)). *See* note 2 *supra*. It was not until 1971, however, that the New Jersey Supreme Court construed the long-arm rule to permit out-of-state service "to the uttermost limits permitted by the United States Constitution." *Avdel Corp.* v. *Mecure*, 58 N.J. 264, 277 A.2d 207 (1971).

New Jersy,[7] post-dated the 1949 amendment to the tolling provision. Therefore, the district court held that the continued application of the tolling provision in cases such as this one served no rational purpose and consequently violated the United States constitution. *See* 447 F. Supp. at 910-12.

Both parties appealed from the judgment of the district court. In No. 79-2605, Searle contends that the district court erred by concluding that the presence of its detail-persons in New Jersey did not entitle it to the benefit of the statute of limitations. In No. 79-2406, the Cohns argue, contrary to the district court's holding, that the tolling provision is a rational exercise of the legislature's prerogative and thus is constitutional.

B.

In the second appeal before us, *Hopkins* v. *Kelsey-Hayes, Inc.*, the plaintiff, Hopkins, was injured on May 18, 1975 when a tire mounted on a rim which had been manufactured by Kelsey-Hayes exploded. This lawsuit was filed on April 27, 1978, nearly three years after plaintiff's cause of action had accrued. Kelsey-Hayes is a Delaware corporation, which has never been represented in New Jersey. However, at all times it has been subject to New Jersey's long-arm jurisdiction.

---

[7] The United States Supreme Court sanctioned broad long-arm rules in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), when it held that states could exercise *in personam* jurisdiction over out-of-state defendants with only "certain minimum contacts" with the forum state. Expansive long-arm jurisdiction in New Jersey was not recognized until much later, however. *See* note 6 *supra.*

Appendix A

Before a different district court judge than the judge who presided in *Cohn* v. *G. D. Searle, Inc.*, Kelsey-Hayes claimed the benefit of New Jersey's two year statute of limitations and moved for summary judgment. Plaintiff responded that the running of the limitations statute was tolled by N.J.S.A. §2A:14-22, *see* note 4 *supra*, and that therefore its complaint was not barred. Alternatively, the plaintiff argued that the statute was tolled under New Jersey's "discovery rule," *see Lopez* v. *Swyer*, 62 N.J. 267, 300 A.2d 563 (1973), *Fernandi* v. *Strully*, 35 N.J. 434, 173 A.2d 277 (1961), under which the statute does not begin to run until the plaintiff has had a reasonable opportunity to "discover" the identity of the person who caused his injury. At the pre-trial stage, Kelsey-Hayes responded only to the plaintiff's first argument. It claimed that the tolling provision, when applied to defendants subject to New Jersey's long-arm jurisdiction, violated the due process and equal protection clauses of the United States constitution.

In ruling on Kelsey-Hayes' summary judgment motion, the district court similarly confined its analysis to the constitutionality of the tolling provision. The district court judge in *Hopkins* expressly disagreed with the constitutional holding reached by the district court judge in *Cohn* v. *G. D. Searle, Inc., supra*. The *Hopkins* court concluded that since under New Jersey law, obtaining jurisdiction over non-represented foreign corporations process under the long-arm rule was more difficult than obtaining jurisdiction over foreign corporations which were represented in New Jersey, a rational basis existed for distinguishing between these two categories of defendants. Having found that this "rational basis" supported the tolling provision, the district court rejected both defendant's due process and

equal protection arguments. *Hopkins* v. *Kelsey-Hayes, Inc.*, 463 F. Supp. 539, 542 (D.N.J. 1978).

Pursuant to 28 U.S.C. § 1292(b), the district court and this court certified Kelsey-Hayes' interlocutory appeal from the order denying summary judgment.

C.

Shortly before we heard argument in these cases, counsel called our attention to *Velmohos* v. *Maren Engineering Corp.*, No. A-72/143 (N.J. Sup. Ct. June 18, 1980), a case which was at that time pending before the New Jersey Supreme Court. *Velmohos* involves the identical issues raised in these appeals.

In *Velmohos*, as in these cases, New Jersey plaintiffs had sued non-represented foreign corporations in tort, and had relied upon the tolling provision in response to a statute of limitations defense. The state defendants in *Velmohos* raised two arguments against application of the tolling provision. First, they claimed that their amenability to New Jersey's long-arm jurisdiction constituted sufficient "representation" within the state to entitle them to a limitations defense—in that case, two years. Secondly, they argued that, as applied to them, the tolling provision violated the federal constitution. In an unreported opinion, the state trial court in *Velmohos* struck down the tolling provision on federal constitutional grounds, adopting the reasoning of the district court in *Cohn* v. *G. D. Searle & Co.*, *supra*. This decision was reversed by the Appellate Division of the Superior Court, which held that the tolling provision was rational and was thus constitutional. 168 N.J. Super. 520 (App. Div. 1979).

Appendix A

Notwithstanding the pendency of the *Velmohos* appeal before the New Jersey Supreme Court, we heard arguments on the merits in the appeals before us. Nevertheless, recognizing that certain holdings of the New Jersey Supreme Court would have binding effect upon us,[8] and at the suggestion of all the parties, we agreed to withhold decision in these cases pending the decision in *Velmohos*.

On June 18, 1980 the New Jersey Supreme Court filed its opinion in *Velmohos*, affirming the Appellate Division. *Velmohos* v. *Maren Engineering Corp.*, No. A-72/143 (N.J. Sup. Ct. June 18, 1980). The court, in construing the New Jersey statute which provides for tolling, held that a foreign corporation's mere amenability to New Jersey's long-arm jurisdiction did not constitute sufficient "representation" of that corporation in New Jersey to prevent the tolling of the statute of limitations. *Id.*, slip op. at 17. In so holding, the New Jersey Supreme Court reasoned that the "language [of the tolling provision] must be interpreted from the intent of the Legislature at the time of enactment." *Id.*, slip op. at 15. At the time the tolling provision was enacted, the concept of "representation" within New Jersey, as that term is used in the tolling provision, could not have included amenability to long-arm jurisdiction, because long-arm jurisdiction did not then exist. *See* notes 6 and 7 *supra*. Thus, the court reasoned that incorporating the judicial expansion of long-arm jurisdiction into its interpretation of

---

[8] Any construction of the New Jersey tolling provision by the state's highest court would, of course, be binding upon us. Similarly, we would be bound if the New Jersey Supreme Court *struck down* the provision on *state* constitutional grounds. However, any decision of the New Jersey Supreme Court on *federal* constitutional grounds is not binding upon us.

the tolling provision would be accepting the argument that "a Rule of Court can act as an implied, partial repeal of a legislative enactment." This the Supreme Court of New Jersey refused to do, *Velmohos, supra,* slip op. at 16.

Having thus disposed of the defendants' statutory arguments,[9] the *Velmohos* court then proceeded to consider and, after consideration, to reject the constitutional challenges to the tolling provision. The court concluded that the existence of long-arm jurisdiction did not destroy the rationality of the tolling provision, observing that extraterritorial service is far more difficult to achieve than service within the state. *Id.,* slip op. at 23.[10]

Since *Velmohos* has been decided and we have received comments from the parties, we now turn to the issues presented to this court. We conclude that the defendants in both cases are subject to the New Jersey tolling provision and that the tolling provision does not violate the fourteenth amendment of the United States constitution.

---

[9] Two justices dissented from the majority opinion in *Velmohos.* They would have construed the tolling provision as inapplicable to corporations which are amenable to long-arm jurisdiction. Consequently, they did not reach the constitutional questions. *See Velmohos* v. *Marne Engineering Corp., supra* (Sullivan, J. dissenting, joined by Handler. J.)

[10] The New Jersey Supreme Court observed that, had the statute been attacked under the New Jersey state constitution, its analysis and result would have been no different. *Velmohos, supra,* slip op. at 18-19 n.12.

Appendix A

II.

A.

The first step in our analysis of the merits of these appeals has been facilitated, to a great extent, by the opinion of the New Jersey Supreme Court in *Velmohos*. For after *Velmohos*, a corporation whose only "presence" in New Jersey is that it is amenable to the state's long-arm jurisdiction, clearly cannot argue that under the tolling statute it is "represented" in New Jersey so as to obtain the benefit of New Jersey's limitations statute.[11] In *Kelsey-Hayes*, this holding settles the statutory issue, enabling us to proceed directly to the constitutional question, because *Kelsey-Hayes*, the corporate defendant in that case, had no other "presence" in New Jersey apart from its amenability to long-arm jurisdiction.

In *Searle*, however, the statutory issue has not been completely resolved by *Velmohos* in light of the presence of Searle's detail-persons in New Jersey. The district court in *Searle* ruled that the existence of these detail-persons did not preclude the operation of the tolling statute, and Searle's appeal from that ruling is the subject of No. 79-2605. Although it has not expressly decided the issue before us, we are convinced from the *Velmohos* opinion, that the New Jersey Supreme Court would simi-

---

[11] Many other state courts have construed their tolling provisions differently, so that out-of-state defendants amenable to long-arm jurisdiction would be exempt from the tolling rule. *See generally* Annot., *Tolling of Statute of Limitations During Absence from State as Affected by Fact that Party Claiming Benefit of Limitations Remained Subject to Service During Absence or Nonresidence*, 55 A.L.R.3d 1158. As the *Velmohos* majority points out, however, those cases involved different statutory language than the New Jersey tolling provision. *See Velmohos, supra* slip op. 14 & 14n.8

larly conclude that Searle's detail-persons are not the "representatives" contemplated within the tolling provision.

As previously indicated, in *Velmohos,* the New Jersey Supreme Court emphasized that the language of the tolling provision "must be interpreted from the intent of the Legislature in light of the circumstances at the time of enactment." *Velmohos, supra,* slip op. at 15. At the time the tolling provision was amended to refer to corporations which were "represented" in New Jersey, *see* note 5 *supra,* personal service upon minor functionaries such as Searle's detail-persons would not have sufficed to obtain jurisdiction over foreign corporations. *In personam* jurisdiction over foreign corporations could only have been obtained by service upon officers or duly appointed agents of the company. *See* N.J.S.A. §2:26-44 (repealed) (quoted in note 6 *supra*); *Porcelli* v. *Great Atlantic & Pacific Tea Co.,* 128 N.J.L. 603, 27 A.2d 641 (Sup. Ct. 1941); *cf.* N.J. Ct. R. 4:4-4(c)(1); *Wright* v. *News Syndicate Co.,* 35 N.J.Super. 133, 113 A.2d 215 (1955) (service on "any servant of the corporation" within New Jersey appropriate under current rules). Thus, the New Jersey legislature could not have intended that individuals such as Searle's detail-persons could obtain the benefits of the limitations statutes for their companies, particularly since the detail-persons had only a minimal affiliation with Searle and could not, at the time tolling provision was enacted, have subjected Searle to *in personam* jurisdiction in New Jersey.

Moreover, it is significant, as the New Jersey Supreme Court noted, *see Velmohos, supra,* slip op. at 15, that the tolling provision speaks of individuals who "represent,"

rather than just "act" for, the foreign corporation in New Jersey. By contrast, the applicable court rules of service speak only of "servants" who merely "act" in New Jersey. *See* N.J. Ct.R. 4:4-4(c)(1). It appears to us, therefore, that the statutory tolling provision contemplates a much more significant corporate figure or presence—one capable of "representing" the corporation—than does the service rule. This higher standard which requires "representation" in New Jersey before a foreign corporation can receive the benefits of the limitations statutes, comports with the original purpose of the tolling rule: to permit plaintiffs who have causes of action against foreign corporate defendants which are not represented in New Jersey, to maintain the viability of their actions despite the passage of time. Moreover, this purpose is consistent and compatable with New Jersey's policy of liberally construing limitations statutes so as to preserve, whenever possible, a plaintiff's opportunity to litigate his claim on the merits. *See Velmohos, supra, Galligan* v. *Westfield Centre Service, Inc.,* 82 N.J. 188, 412 A.2d 122 (1980).

Therefore, in light of its own statutory analysis, we are satisfied that the New Jersey Supreme Court, if faced with this question, would hold that Searle's detail-persons do not constitute "representation" of Searle in New Jersey, sufficient to provide New Jersey's limitations protections to Searle. To the contrary, we are convinced that the New Jersey Supreme Court would hold, and consequently we hold, that Searle's detail-persons do not exempt it from the tolling provision. Accordingly, unless the tolling provision is unconstitutional, and we conclude that it is not, the limitations statute will not bar the plaintiffs' claims against the defendants in both cases before us.

Appendix A

B.

Thus, there remains for consideration only the constitutional challenges made here to the tolling provision. The defendants concede that the tolling provision does not implicate any fundamental interest or suspect classification.[12] In these circumstances, we ordinarily afford great leeway to legislative judgments. As we recently stated:

---

[12] Indeed, this concession would seem to be compelled by *Campbell* v. *Holt*, 115 U.S. 620 (1885) where the Supreme Court held that repeal of a statute of limitations as to debts which had already been barred did not implicate the fourteenth amendment rights of the debtor. In reaffirming *Campbell*, some 60 years later, the Court, speaking through Justice Jackson, stated:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation.[13] They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large decree of legislative control.

Chase Securities Corp. v. *Donaldson*, 325 U.S. 304, 314 (1945) (footnote omitted). Thus, it is clear that the defendants have no "right" to protection of the statute of limitations. Their only claim can be that the state legislature acted irrationally, under the circumstances, by denying them the benefit of the limitations statute.

Appendix A

> In reviewing a state statute or constitutional provision under the due process or equal protection clause, a court must determine if the provision rationally furthers *any* legitimate state objective. "For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision. . . ." *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960). The court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack. *See Weinberger* v. *Salfi*, 422 U.S. 749, 780 (1975); *Williamson* v. *Lee Optical Inc.*, 348 U.S. 483, 487-90 (1955); *Trafelet* v. *Thompson*, 594 F. 2d 623, 626 (7th Cir.), *cert. denied*, —— U.S. ——, 48 U.S.L.W. 3239 (Oct. 1, 1979).

Malmed v. *Thornburgh*, No. 79-2467, slip op. at 7, (3d Cir. May 13, 1980) (Aldisert, J.) (emphasis in original). Thus, the defendants challenging the constitutionality of the tolling provision have the difficult burden of demonstrating that the provision cannot "rationally further[ ] *any* legitimate state objective." *Id.*

In seeking to meet this burden, the defendants argue that the tolling provision violates the constitution because it is overprotective.[13] They argue that the purpose

---

[13] When no fundamental interests or suspect classifications are involved, both "underinclusive" and "overinclusive" statutes are subjected to the same "minimum rationality" test. Nevertheless, it has been argued that "overinclusive" or overprotective statutes present even less need for judicial action than statutes which are "underinclusive" in their regulatory sweep.

(Footnote continued on following page)

of the tolling provision was to protect New Jersey plaintiffs who could not obtain *in personam* jurisdiction over out-of-state defendants.[14] The defendants contend that the tolling provision is no longer relevant or needed to promote this interest in cases where an out-of-state corporate defendant is amenable to New Jersey's long-arm jurisdiction. In such cases, they contend the plaintiffs may assert their causes of action and serve their complaints upon non-represented foreign corporate defendants in the same fashion as they serve domestic corpora-

---

(Footnote continued from preceding page)

> "Overinclusiveness," a second variant of legislative approximation for which a classification may be overturned,[16] poses less danger than underinclusiveness, at least from the viewpoint of political accountability, for overinclusiveness does not exempt potentially powerful opponents from a law's reach.

L. Tribe, American Constitutional Law, 999 (1978). (Footnote omitted).

[14] In a technical sense, this appears to be an over-simplification. In 1949, the tolling provision was amended to exempt foreign corporations "represented in this state by any person or officer upon whom summons . . . may be served. . . ." Four years earlier, however, the Supreme Court had greatly expanded the states' jurisdictional powers over out-of-state defendants, permitting the state courts to exercise *in personam* jurisdiction over out-of-state defendants with "certain minimum contacts" with the forum state. *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945). Thus, at the time the tolling provision was last amended, New Jersey plaintiffs could have constitutionally obtained service on foreign corporations who did not have "representatives" in the state. The New Jersey courts did not recognize the full expanse of long-arm jurisdiction until much later, however. *See Avdel Corp.* v. *Mecure,* 58 N.J. 264, 277 A.2d 207 (1971); notes 6 and 7 *supra.*

tions or foreign corporations "represented" in New Jersey. Thus, they claim that the extra protection provided New Jersey plaintiffs by the tolling provision, is unnecessary and arbitrary in light of the original purpose of the tolling provision. Being arbitrary, they contend the statute is therefore unconstitutional.

The defendant's argument overlooks the fact that the tolling provision must be upheld if it "rationally furthers *any* legitimate state objective," without regard to whether the legislature specifically focused on that objective. *Malmed* v. *Thornburgh, supra.* In this case, at least one such legitimate objective is readily apparent: the tolling provision eases the burdens upon New Jersey plaintiffs prosecuting lawsuits against out-of-state defendant corporations which are not represented in New Jersey and which, in a great many instances, are difficult to locate and to serve, despite the availability of the long-arm rule. The New Jersey Court Rules, by their very terms, make clear that long-arm service may be utilized only as a last resort. They provide that service may be made

> [u]pon a domestic or foreign corporation, by serving . . . either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. *If it appears by affidavit of plaintiff's at-*

> *torney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing* and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

N.J. Ct.R. 4:4-4(c)(1) (emphasis added).

Moreover, Justice Pashman in writing for the New Jersey Supreme Court in *Velmohos* emphasized the special burdens which inhere in achieving long-arm service:

> Under our rules, extra-territorial service is not simply an alternative to service within the State. Plaintiffs may not resort to out-of-state service unless proper efforts to effect service in New Jersey have failed. The rule imposes a further burden on a plaintiff by requiring him to gather sufficient information to satisfy a court that service is "consistent with due process of law."

Velmohos, supra, slip op. at 23.

Since long-arm service is more difficult to achieve than service within the state, it is not irrational for New Jersey to distinguish between two classes of foreign corporations. Those foreign corporations which are represented in New Jersey, and are thus more readily available to plaintiffs, are afforded limitations protections. On the other hand, the limitations statutes are tolled against foreign corpora-

tions which are not represented in New Jersey and thus are not as available to New Jersey plaintiffs. This distinction betwen represented and non-represented foreign corporations reflects the pragmatic difficulties which may be encountered by plaintiffs suing foreign corporations. Since service of process under the long-arm statute is more difficult and time-consuming to achieve than service within the state, and since out-of-state, non-represented corporate defendants may be difficult to locate let alone serve, tolling the statute of limitations protects New Jersey plaintiffs and facilitates their lawsuits against such defendants. Because the tolling provision fulfills the legitimate state purpose of easing the special burdens of suits against non-represented foreign corporations, we cannot say that the distinction which it recognizes is irrational.[15]

In arguing against the constitutionality of the tolling provision, the defendants attempt to distinguish between the service of a complaint and the filing of a complaint. They point out that, under New Jersey practice, a plaintiff can

---

[15] Although many courts have construed state tolling statutes so as to exempt individuals who are subject to service of process in the state, *see* note 10 *supra*, no court, other than the district court in *Cohn* v. *Searle*, *supra*, has concluded that such a result was mandated by the constitution. In fact, in *Vaughn* v. *Deitz*, 430 S.W.2d 487 (Sup. Ct. Tex. 1968), the Texas Supreme Court specifically upheld the Texas tolling statute against a constitutional argument identical to that raised here.

Moreover, in *Bauserman* v. *Blunt*, 147 U.S. 647 (1893), the Supreme Court gave effect to a Kansas statute which tolled the statute of limitations in an action against an out-of-state defendant who was nevertheless subject to service in the state. Although *Bauserman* did not discuss the constitutional issue, the court implicitly recognized the constitutionality of this type of tolling provision.

file a "John Doe" complaint, and thereby stop the running of the statute of limitations without having served the defendant with process. *See* N.J. Ct.R. 4:4-1 (summons must be served within 10 days of filing a complaint or action may be dismissed on defendant's motion). This procedure, they argue, enables a plaintiff to preserve his complaint against a statute of limitations defense, notwithstanding any later difficulties encountered in serving process. Because of this procedure, the defendants contend that the protection afforded by the tolling provision is superfluous and that the tolling provision is thus arbitrary, irrational and, consequently, unconstitutional.

We are not persuaded by the defendants' argument. In the first instance, the protection afforded plaintiff by the "John Doe" procedure is imperfect, at best. Complaints filed in this manner are subject to dismissal after six months on the court's own motion, unless the plaintiff, by proving his diligence, can convince the court to retain the case on the docket. N.J.Ct.R. 1:13-7. We do not believe that, given their crowded calendars, the state courts would permit a "John Doe" complaint to remain on the docket for a lengthy or indefinite period of time. Thus, the "John Doe" procedure does not, in fact, afford New Jersey plaintiffs the same protection as the tolling provision. Furthermore, the defendants' argument suffers from a more basic flaw. Even if the tolling provision could be considered superfluous in light of the "John Doe" procedure, this would not necessarily lead to our holding that the tolling provision is arbitrary or irrational. Nothing in law or logic prevents the New Jersey legislature from providing New Jersey plaintiffs with a mechanism for relief from the burdens of suits against non-represented foreign corporations which is additional to any mechanism found in the Court Rules.

Accordingly, since we find that N.J.S.A. §2A:14-22 has a rational foundation, and recognizing that rationality is the test for both due process and equal protection challenges in this context, *see Malmed* v. *Thornburgh, supra,* we reject the defendants' constitutional attacks on the statute.

III.

We therefore hold that the foreign corporate defendants in these cases, not being represented in New Jersey, are subject under New Jersey law to New Jersey's tolling provision, which we hold to be constitutional. Thus, in these cases, defendants may not claim the protection of the statute of limitations. In light of our conclusion, the interlocutory order of the district court which denied summary judgment in *Hopkins* v. *Kelsey-Hayes,* at No. 79-1881, will be affirmed, and the order of the district court in *Cohn* v. *G. D. Searle,* at Nos. 79-2406 and 79-2605, entering judgment for the defendant will be reversed. Each case will be remanded to the particular district court for further proceedings. Costs in each case will be taxed against the respective defendant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1881

ROY HOPKINS

vs.

KELSEY-HAYES, INC.,

Appellant

(D. C. Civil No. 78-1646)

Nos. 79-2406 and 79-2605

SUSAN COHN and WALTER R. COHN, her husband,

Appellants in No. 79-2406

vs.

G. D. SEARLE & COMPANY,

Appellant in No. 79-2605

(D. C. Civil No. 74-0450)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Appendix B

PRESENT: ADAMS, VAN DUSEN AND GARTH, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel on February 11, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 27, 1979 and appealed at our No. 79-1881, be, and the same is hereby affirmed, and the judgment of the said District Court filed August 6, 1979 and appealed at our Nos. 79-2406 and 79-2605, be, and the same is hereby reversed, and the causes are remanded to the particular District Court for further proceedings consistent with the opinion of this Court. Costs in each case are taxed against the respective defendant.

ATTEST:

THOMAS QUINN
Clerk

July 23, 1980

APPENDIX C

Opinion of the United States District Court for the District of New Jersey Re: Cohn v. G. D. Searle & Company

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civ. A. No. 74-450

March 22, 1978

SUSAN COHN and WALTER COHN, her husband,

Plaintiffs,

v.

G. D. SEARLE & COMPANY,

Defendant.

Walter R. Cohn, Newark, N. J., for plaintiffs.

Shanley & Fisher by Raymond M. Tierney, Jr., Robert L. Dughi, Newark, N. J., for defendant.

OPINION

MEANOR, District Judge.

This matter comes before the court on defendant's motion for summary judgment. For reasons stated hereinafter, the issues presented by this motion will be treated

in two stages. This first opinion is addressed to the question whether the defendant is entitled to the benefit of the statute of limitations. The resolution of the issue turns on the construction and application of the New Jersey tolling statute to a foreign unlicensed corporate defendant which, from the time of the occurrence of the injury alleged in the instant complaint, had no formal presence within New Jersey yet remained amenable to long-arm service.

If it is determined that the defendant has available to it the defense of the statute of limitations, then it will be necessary to decide whether the plaintiffs are entitled to the "discovery" exception to strict application of the statute.

Plaintiffs Susan and Walter Cohn have brought this suit against G. D. Searle & Co. (hereinafter "Searle"), the manufacturer of the oral contraceptive Enovid, for personal injury and per quod damages allegedly resulting from Mrs. Cohn's use of the drug. Mrs. Cohn commenced taking the contraceptive in the spring of 1963 and continued its use until December 22, 1964. On that date she suffered a stroke, or cerebral vascular accident (C.V.A.), when a blood clot lodged in the circulatory system of her brain. The C.V.A. required surgery, long hospitalziation and rehabilitative therapy and resulted in permanent physical injury.

From the sparse information before me at this time it appears that in 1964 little or nothing was known about potential coagulant side effects of oral contraceptives. However, from at least 1966 the medical literature and the lay press increasingly reported work which suggested a relationship between oral contraceptives and abnormal blood clotting. Sometimes between 1966 and late 1973 the Cohns became

aware of the possible linke between Mrs. Cohn's C.V.A. and ingestion of Enovid. They initiated suit against Searle on January 29, 1974. Their complaint, predicated on theories of negligence, breach of warranty, statutory violations and strict liability, was filed in the Superior Court of New Jersey, Law Division, Bergen County. Service was effected on Searle under the long-arm rule. On April 1, 1974 the case was removed to this court pursuant to 28 U.S.C. § 1441. Jurisdiction is vested under 28 U.S.C. § 1332.

At all times relevant to this action the plaintiffs have been residents of New Jersey. Searle is a Delaware corporation with its principal place of business in Illinois. Prior to December 30, 1960 Searle was registered to do business in New Jersey, but on that date it formally withdrew from the state. However, from 1964 to 1974, the period between Mrs. Cohn's C.V.A. and the filing of the instant complaint, Searle retained in its employ some four dozen persons known as Medical Service Representatives or "detailmen" who worked and, in most cases, resided in New Jersey. The function of these detailmen was to call on physicians to discuss Searle's pharmaceutical products.

Searle moves for summary judgment on grounds that plaintiffs' cause of action is time-barred undere the relevant two-year statute of limitations, N.J.S.A. 2A:14-2 (1952).[1] Searle acknowledges that plaintiffs may have some relief from the strict two-year limit under the New Jersey "discovery" rule. *Fernandi* v. *Strully*, 35 N.J. 434, 173 A.

---

[1] N.J.S.A. 2A:14-2 provides:

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

2d 277 (1961); *Lopez* v. *Swyer*, 62 N.J. 267, 300 A.2d 563 (1973). Nevertheless, Searle asserts that the Cohns had reason to know of the cause of action against Searle no later than 1970, and, therefore, their claims are precluded.

[1] Plaintiffs respond that their action is timely because the causal relationship between contraceptives and clotting was not definitively demonstrated until late 1973, and that in any case the New Jersey tolling statute, N.J.S.A. 2A:14-22 (1952),[2] deprives Searle of the statute of limitations because Searle is a foreign corporation not represented within the state by "any person or officer" upon whom process

---

[2] N.J.S.A. 2A:14-22 provides:

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause thereof, within the period of time limited thereof by said section, exclusive of such time or times of nonresidence or nonrepresentation.

could be served within the meaning of the tolling statute. Searle retorts that the tolling statute is inapplicable because Searle was effectively represented within the state by its detailmen, or alternatively, by virtue of the fact that from the date of the C.V.A. onward it was subject to New Jersey long-arm jurisdiction. Finally, if the tolling statute, as interpreted by the New Jersey courts, is deemed to apply to a foreign corporation amenable to long-arm service, Searle asserts that the statute as applied violates the equal protection and due process clauses of the United States Constitution. Thus, the questions presented by this motion are whether Searle is entitled to the benefit of the statute of limitations, and if so, whether the plaintiffs' action is timely upon application of the "discovery" rule even though the instant complaint was filed over nine years after the injury to Mrs. Cohn. I shall consider the statute of limitations issue here. Because I find Searle is entitled to a statute of limitations defense, I must reach the second question, but I leave it for another day.[3]

---

[3] The parties are still negotiating over the terms of a submission, if necessary, on the discovery issue. In the New Jersey courts resolution of that issue would take place without a jury, *Lopez* v. *Swyer, supra,* but here jury trial exists as a matter of right. *Goodman* v. *Mead Johnson & Co.,* 534 F.2d 566 (3d Cir. 1976). I understand that the parties are willing to submit the discovery question to me on the existing written record without an evidentiary hearing and, of course, without jury trial. I am willing to accept it on that basis. However, I am informed that the defendant seeks to exact from the plaintiffs an agreement that any facts found as a result of such a submission of the issue be reviewed on appeal by the "clearly erroneous" standard of Rule 52(a), F.R.Civ.P., rather than to permit the Court of Appeals to review such fact determinations without the constraints of the clearly erroneous standard. *See Government of Virgin Islands* v. *Gereau,* 523 F.2d 140, 145-146 (3d Cir. 1975).

[2-5] At the heart of the issue of whether Searle has a statute of limitations defense is the construction and application of the tolling statute. N.J.S.A. 2A:14-22 provides in relevant part:

> If any person against whom there is any of the causes of action specified in section 2A:14-1-5 and 2A:14-8 . . . is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or *if any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which* such person . . . is not residing within this state or *such corporation . . . is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section.* The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

(Emphasis supplied.) The statute exempts from its effect foreign corporations represented in the state by "any person or officer" upon whom process may be served.

It is undisputed that Searle has had no statutory or appointed agent in New Jersey at any time from the date of

Mrs. Cohn's C.V.A. Nevertheless, Searle first argues that it is within the foreign corporation exception because it was represented by detailmen who are "persons or officers" within the meaning of the tolling statute. The rules pertaining to service on foreign corporations from the date of Mrs. Cohn's injuries are R.R. 4:4-4(d) (effective Sept. 3, 1958) and its successor R. 4:4-4(c)(1) (effective Sept. 8, 1969) (current version). Searle notes that under these rules jurisdiction may be obtained over a foreign corporation "by serving . . . any servant of the corporation within this State acting in the discharge of his duties." Searle argues that the tolling statute must be construed to be consistent with the service rules during the time period relevant to this action, and since personal jurisdiction could have been obtained over Searle by serving a detailman in the discharge of his duties, representation by detailmen during the period was sufficient to stay the tolling of the statute of limitations.

Searle's argument is not persuasive for two reasons. First, Searle's proposed construction of the foreign corporation exception to the tolling statute is inconsistent with the manifest purpose of the statute itself. That enactment was intended to protect plaintiffs in New Jersey courts[4] by preserving their causes of action where ser-

---

[4] The courts of New Jersey have found that the tolling statute operates to the benefit of residents and nonresident plaintiffs whose causes of action have accrued within the state. *Govan* v. *Trade Bank & Trust Co.*, 109 N.J.Super. 271, 263 A.2d 146 (App.Div. 1970); *Marsh* v. *Davis*, 99 N.J.Super. 130, 238 A.2d 709 (Law Div. 1968). However, in a subsequent opinion which failed to mention *Govan* the Third Circuit has held that the tolling statute protects only New Jersey residents. *Zelson* v. *Thomforde*, 428 F.2d 1360 (3d Cir. 1970).

vice could not be had upon a defendant on account of absence from the state. *Lemke* v. *Bailey*, 41 N.J. 295, 303, 196 A.2d 523 (1963) (Schettino, J., dissenting); *Ferraro* v. *Ferro Trucking Co.*, 72 N.J.Super. 519, 524, 179 A.2d 74 (Law Div. 1962). Searle's detailmen operated out of their homes because Searle had no office within this state. They reported to Searle's office in Skokie, Illinois. Their function was to talk to New Jersey doctors about Searle's products to advertise them and generate good will for the company. Searle does not assert that they had any power to make contracts or place orders. Thus, the detailmen had minimal association with Searle in the public eye and had very limited authority to act on behalf of the company. It is inconceivable, in light of the purpose of the tolling statute, that the legislature intended to give the benefit of the statute of limitations to a foreign corporate defendant whose only representation within the state was by employees so invisible as these.

The second reason that Searle's rationale is not convincing is that it incorporates into the tolling statute changes in the law which were made after the act's passage. Narrowly drawn statutory language must be interpreted from the intent of the legislature in light of circumstances at the time of enactment. 2A *Sutherland*, Statutory Construction § 49.02 (4th Ed. 1973). "A new meaning may not be given the words of an old statute in consequence of changed conditions probably not foreseen by the Legislature." *Fidelity & Deposit Co. of Maryland* v. *Abagnale*, 97 N.J. Super. 132, 143-44, 234 A.2d 511, 518 (Law Div. 1967). The present tolling statute has its origins in an enactment of the Council and General Assembly of New Jersey on February 21, 1820. The foreign corporations exception was

added by amendment in 1949.[5] The only legislative history relating to the 1949 amendment is the introduction statement of the bill's sponsor, Assemblyman Mackey, which provides:

> Foreign corporations licensed to do business in New Jersey are now deprived by judicial construction of the benefit of the Statute of Limitations. The purpose of this bill is to correct that situation. New York State found it necessary to make a similar change in its laws in view of recent court decisions.

The import of this statement of legislative purpose is far from unambiguous, but it sheds some illumination on the phrase "any person or officer" as used in the tolling statute.

An understanding of Mackey's introductory statement requires an analysis of the New York law to which it refers. In 1949 New York's tolling statute was C.P.A. § 19, which had most recently been amended in 1943. Before 1943, § 19 had included an exception[6] from the tolling

---

[5] Act of May 18, 1949, 1949 N.J.Laws, ch. 125 (amending N.J.R.S. 2:24-7 (1937); current version at N.J.S.A. 2A:14-22).

[6] Before 1943 C.P.A. § 19 provided in pertinent part:

> But this section does not apply while a designation made in pursuance of law of a resident of the state on whom a summons may be served for another person or corporation remains in force. Nor does this section apply while a foreign corporation has had or shall have one or more officers in the state on whom a summons for such corporation may be served.

N.Y.C.P.A. § 19 (1920), *as amend by* Act of Apr. 5, 1928, 1928 N.Y.Laws, ch. 809 (current version at N.Y.Civ.Prac.Law (McKinney) § 207 (1972)).

statute for persons or corporations with a designated agent for the service of process and foreign corporations with officers who might be served within the state. The 1943 amendment[7] to § 19 enlarged the exception to include persons or corporations with agents for service of process designated by statute or appointment and foreign corporations with "officers or other persons" who might be served. The revision notes appended to the amendment indicate that the foreign corporation exception was broadened to include persons besides officers who were servable pursuant to C.P.A. § 229. At that time, C.P.A. § 229,[8] governing

---

[7] The amendment provided in pertinent part:

> But this section does not apply in either of the following cases:
>
> 1. while a designation or appointment, voluntary or involuntary, made in pursuance of law, of a resident or nonresident person, corporation, or private or public officer on whom a summons may be served within the state for another resident or nonresident person or corporation with the same legal force and validity as if served personally on such person or corporation within the state, remains in force.
>
> 2. while a foreign corporation has had or shall have one or more officers or other persons in the state on whom a summons for such corporation may be served.

Act of Apr. 3, 1943, 1943 N.Y.Laws, ch. 263.

[8] C.P.A. § 229 at that time provided in pertinent part:

> When any natural person or persons not residing in this state shall engage in business in this state, in any action against such person or persons arising out of such business, the summons may be served by leaving a copy thereof with the complaint with the person who, at the time of service, is in charge of any business in which the defendant or defendants are engaged within this state . . . .

Act of Apr. 15, 1941, 1941 N.Y.Laws, ch. 455, *amending* N.Y. C.P.A. § 229 (1920) (repealed 1962).

service on nonresidents engaging in business in New York State, permitted service on the person in charge of any business in which the defendant was engaged within the state. Interpreting the language of the 1943 amendment to C.P.A. § 19 in light of C.P.A. § 229, it appears that at most the amendment broadened New York's foreign corporation exemption to include companies represented within the state by statutory or appointed agents, officers or business managers. Since the New Jersey Legislature intended in 1949 to adopt a tolling exemption similar to New York's, the New Jersey Legislature could not have intended that an employee with no managerial authority, such as a detailman, could be a representative sufficient to bring a foreign corporation out of the tolling statute.[9]

---

[9] Mackey's introductory statement to the 1949 amendment to the New Jersey tolling statute indicated that New York had amended its tolling statute in a similar fashion in response to recent court decisions. Research has disclosed no significant cases prior to 1943 regarding persons through whom a foreign corporation might be served. However, section 1 of the 1943 amendment to C.P.A. § 19, n. 5 *supra*, was adopted specifically to alter the rule of *Maguire* v. *Yellow Taxicab Corp.*, 253 A.D. 249, 1 N.Y.S.2d 749, *rehearing denied*, 253 A.D. 890, 2 N.Y.S.2d 1021, *aff'd mem.*, 278 N.Y. 576, 16 N.E.2d 110 (1938), which held that amenability to process through the Director of Motor Vehicles did not exempt a nonresident defendant from the tolling statute. These facts suggest that the New Jersey Legislature may well have intended that representation by a statutory agent within the state would be sufficient to satisfy the tolling statute's foreign corporation exemption. *See Ferraro* v. *Ferro Trucking Co.*, 72 N.J.Super. 519, 179 A.2d 74 (Law Div. 1962). *But see Whalen* v. *Young*, 28 N.J.Super. 543, 101 A.2d 64 (Law Div. 1953), *reversed on other grounds*, 15 N.J. 321, 104 A.2d 678 (1954); *Lackovic* v. *New England Paper Tube Co., Inc.*, 127 N.J.Super. 394, 317 A.2d 426 (Law Div. 1974). *Cf. Lemke* v. *Bailey, supra.*

Appendix C

This conclusion is strengthened by reference to the law in New Jersey regarding service on foreign corporations at the time of enactment of the New Jersey foreign corporation exemption. In 1948, a year before the tolling statute amendment, the legislature amended N.J.R.S. 2:26-43 and 44[10] providing for service on corporations. Those amendments permitted acquisition of personal jurisdiction over foreign corporations by service on an officer, director, trustee, managing or general agent or agent by appointment or by law for the service of process. A detailman with minimal agency powers could not be considered a

---

[10] The 1948 amendment to N.J.R.S. 2:26-43 and 44 (1937) (repealed 1951) provided:

> 2:26-43. Domestic corporations in personal actions; personal or substituted service of summons.
>
> Service of a summons in a civil action commenced against a domestic corporation in any of the courts of this State may be made by delivering a copy thereof to an *officer, director, trustee or a managing or general agent of the corporation personally*, or by leaving a copy thereof at his dwelling house or usual place of abode with some competent member of his family of the age of fourteen years or over then residing therein, or by delivering a copy thereof to any person authorized by appointment or by law to receive service of process on behalf of the corporation, or by leaving a copy thereof at the registered office of the corporation with any person in charge thereof.
>
> 2:26-44. Foreign corporations.
>
> Service of a summons in a civil action commenced against a foreign corporation may be made in the same manner as is provided in section 2:26-43 of the Revised Statutes for service of summons upon a domestic corporation.

Act of Sept. 10, 1948, 1948 N.J.Laws, ch. 356.

managing or general agent, nor any other individual within the statutory list. Since in 1949 personal jurisdiction over a foreign corporation could not have been obtained by serving a detailman, the legislature could not have intended an exemption from the tolling provision for an entity represented by such an employee. Searle urges that N.J.S.A. 2A:14-22 be interpreted as consistent with the rule regarding service of process at the time of plaintiff's injury. Such an approach would be inappropriate, however, since the reach of service was substantially expanded in 1953, *Wright* v. *News Syndicate Co., Inc.*, 35 N.J. Super. 133, 135, 113 A.2d 215 (Law Div. 1955), a change which the legislature could not have anticipated in 1949.

[6, 7] Searle next takes the position that because Searle was at all times relevant to the instant complaint amenable to long-arm service,[11] it was represented within the state within the meaning of the tolling statute. The effect of amenability to long-arm jurisdiction on N.J.S.A. 2A:14-22 is a novel question heretofore not considered by the courts.

A number of courts have considered the construction of the New Jersey tolling provisions in light of a defendant's amenability to service through the Director of Motor Vehicles under the nonresident motorist statute, N.J.S.A.

---

[11] New Jersey does not have a long-arm statute under the New Jersey Constitution of 1947, the Supreme Court has exclusive rule-making power over practice, procedure and administration of the courts. *Winbery* v. *Salisbury*, 5 N.J. 240, 74 A.2d 406 (1950). From 1963 to 1974, long-arm service was available over Searle pursuant to the court rules. R.R. 4:4-4(d) (effective Sept. 3, 1958); R. 4:4-4(c)(1) (effective Sept. 8, 1969) (current version).

39:7-2 (1973).[12] In the leading case, *Lemke* v. *Bailey, supra,* the New Jersey Supreme Court held that the tolling statute deprived a nonresident individual defendant of the benefit of the statute of limitations even though the defendant had been subject to service pursuant to N.J.S.A. 39:7-2. Searle argues that *Lemke* should not be considered controlling here because the Supreme Court specifically reserved the question of the effect of availability of substituted service upon a corporate defendant, and, in any case, there the court relied heavily on legislative acquiescence in, and plaintiffs' reliance on, prior court interpretation of the relationship between 2A:14-22 and 39:7-22 and 39:7-2, which consideration would be irrelevant to the novel question here presented. Plaintiffs urge that *Lemke* should be read broadly to hold that the statute of limitations does not run against a nonresident individual, and that *Lemke* binds the court here because there is no reason to treat individual and corporate defendants differently.[13]

---

[12] Holding that amenability to service through the Director of Motor Vehicles does not entitle a nonresident defendant to the benefit of the statute of limitations are *Gotheiner* v. *Lenihan,* 20 N.J.Misc. 119, 25 A.2d 430 (Sup.Ct. 1942); *Whalen* v. *Young,* 28 N.J.Super. 543, 101 A.2d 64 (Law Div. 1953), *rev'd on other grounds,* 15 N.J. 321, 104 A.2d 678 (1954); *Lemke* v. *Bailey, supra; Lackovic* v. *New England Paper Tube Co.,* 127 N.J.Super. 394, 317 A.2d 426 (Law Div. 1974); *Blackmon* v. *Govern,* 138 F.Supp. 884 (D.N.J. 1956). *Contra, Ferraro* v. *Ferro Trucking Co., supra.*

[13] Plaintiffs cite two cases for the proposition that the tolling statute deprives a nonresident defendant of a statute of limitations defense despite amenability to substituted service. *Kenny* v. *Duro-*

(Footnote continued on following page)

Appendix C

(Footnote continued from preceding page)

Test Corp., 91 F.Supp. 633 (D.N.J. 1950); *Mann* v. *Morristown Memorial Hospital*, Civ. No. L-23529-64 (N.J.Super., Law Div., filed Aug. 6, 1965, dismissed by consent Mar. 6, 1968). Neither case supports plaintiffs' argument. *Kenny* held that under the tolling statute a foreign licensed corporation could not plead the statute of limitations despite the fact that it was servable within the state. However, the court indicated that the 1949 foreign corporation exemption was only prospective in effect and therefore inapplicable to that case. *Id.* at 635-36.

On the other hand, the facts in *Mann* do not support the reading that plaintiffs give to its result. *Mann* was a malpractice action against a hospital and two doctors. The plaintiff was treated by the defendants until June 1963, when his cause of action accrued. *Tortorello* v. *Reinfeld*, 6 N.J. 58, 66, 77 A.2d 240 (1950). He filed his complaint on Aug. 6, 1965. Summary judgment was granted to two defendants on statute of limitation grounds, but denied as to Dr. Matthews, who had moved from New Jersey in August 1963 and been served under the long-arm rule. Plaintiffs herein assert that Matthews had been subject to long-arm service from the time of his departure, and, therefore, the denial of his motion for summary judgment represents a holding that the tolling statute always applies to a nonresident defendant despite amenability to sustituted service.

However, long-arm jurisdiction was not available against individual defendants until January 1964. R.R. 4:4-4(j) (effective Jan. 2, 1964) (current version at R. 4:4-4(e)). Assuming that the limitations period would ordinarily run during periods of absence when subject to substituted service, the statute ran against Matthews for two months in 1963 and then re-commenced to run in January 1964. By that calculation, the complaint was filed only some seven months into the limitations period, and the action was timely without the aid of the tolling statute. Thus, the disposition of Matthews' summary judgment motion does not reflect on the relationship between the tolling statute and substituted service.

Appendix C

Amenability to long-arm service cannot be deemed to constitute representation within the state for the very same reason that the foreign corporation exemption is not triggered by he presence within the state of servants acting in the discharge of their duties. The narrow foreign corporation exception must be construed in light of legislative intent at the time of enactment. The tolling statute exemption was adopted in 1949. Although the Supreme Court had held four years earlier that the reach of state process could contitutionally extend beyond the territorial boundaries of a state, *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), long-arm service was not adopted in New Jersey until 1958.[14] Further, the New Jersey courts have tended to construe the tolling statute narrowly so as not to incorporate subsequent broadening of the service laws. *See*, n. 12, *supra*. One court has held in the context of an individual defendant that amenability to long-arm service does not satisfy the tolling statute. *Fidelity & Deposit Co. of Maryland* v. *Abagnale*, *supra*, 97 N.J.Super. at 144, 234 A.2d 511. For these reasons, the foreign corporation section of the tolling statute cannot be construed to encompass extraterritorial service unknown to the legislature at the time of enactment and not within the intendment and scope of the statutory language.[15]

---

[14] Long-arm service over corporations was adopted in 1958. R.R. 4:4-4(d) (effective Sept. 3, 1958). It was extended to individuals in 1964. R.R. 4:4-4(j) (effective Jan. 2, 1964).

[15] Searle has relied on cases construing the Ohio and Idaho tolling statutes to be inapplicable to foreign corporations subject to long-arm jurisdiction. *Partis* v. *Miller Equipment Co.*, 324 F.Supp. 898 (N.D.Ohio 1970); *Lipe* v. *Javelin Tire Co., Inc.*, 96 Idaho 723, 536 P.2d 291 (1975). The tolling statutes in those states provide for tolling when a person is "absent from the state." Such general language lends itself to a broader interpretation than the more restrictive wording of the New Jersey statute.

[8, 9] Finally, Searle argues that if the New Jersey tolling statute acts to deny the statute of limitations to a foreign corporation subject to long-arm jurisdiction, that statute violates the equal protection clause of the United States Constitution.[16] This, too, is an issue of first impression. Searle's position is that a statutory classification must bear a rational relationship to the purpose of the enactment to withstand an equal protection challenge. Where an out- of-state defendant is amenable to process, Searle argues that the purpose of the tolling statute is satisfied, and there is no reason to deny such a defendant the statute of limitations. While conceding that Searle is correct as to the equal protection standard, plaintiffs reply that the classification here under attack is rational because one of the purposes of the tolling statute is to penalize foreign unlicensed corporations by denying them repose to encourage domestication.[17]

---

[16] Searle also makes a due process argument. Because of my holding on the equal protection question, I need not reach Searle's due process claim.

[17] Plaintiffs' position that the tolling statute was intended as a penalty to induce licensure is flawed. N.J.S.A. 14A:13-3(1) (1969) provides that a foreign corporation has no right to transact business within New Jersey without obtaining a certificate of authority from the Secretary of State. Where corporate activities do not meet the standard of "transacting business," registration is not required. *See* N.J.S.A. 14A:13-3(2); N.J.S.A. 14A:13-11 (1969); *Materials Research Corp.* v. *Metron*, 64 N.J. 74, 312 A.2d 147 (1973); *United States Time Corp.* v. *Grand Union Co.*, 64 N.J.Super. 39, 165 A.2d 310 (Ch.Div. 1960). Assuming, *arguendo*, that the tolling statute was intended to impose a penalty

(Footnote continued on following page)

Appendix C

The thrust of the equal protection clause is the proscription of arbitrary discrimination between persons similarly situated. *Schmidt* v. *Board of Adjustment of City of Newark*, 9 N.J. 405, 88 A.2d 607 (1952). As more fully stated by the Supreme Court,

> the Fourteenth Amendment does not deny to the States the power to treat different classes of persons in different ways. *Barbier* v. *Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885), *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); *Railway Express Agency* v. *New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533

(Footnote continued from preceding page)

on unlicensed foreign corporations, such a penalty would fall with equal weight on all foreign corporate defendants without representation by persons or officers, irrespective of the nature of their New Jersey activities. Because the standard of state contacts sufficient for long-arm jurisdiction is substantially lower than that for "transacting business," *Materials Research Corp.* v. *Metron*, *supra*, 64 N.J. at 84, 312 A.2d 147, the sanction of the tolling statute would be imposed on corporations which would not be required to register under N.J.S.A. 14A:13-3. While there may be some justification for denying the statute of limitations to corporations transacting business without registration, the tolling statute would reach a far greater class of corporate defendants and, as construed by plaintiffs, that statute would itself effect an irrational classification. Further, since state licensure may not be required of a foreign corporation which is involved in the state solely in interstate commerce, *Eli Lilly & Co.* v. *Sav-On Drugs, Inc.*, 366 U.S. 276, 278 & n. 7, 81 S.Ct. 1316, 6 L.Ed.2d 288 (1961), plaintiffs' reading of the tolling statute would run afoul of the commerce clause. I am aware of no provision imposing penalties for transacting business without a license other than N.J.S.A. 14A:13-11.

(1949); *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920).

Reed v. *Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253, 30 L.Ed. 2d 225 (1971). *Accord, N.J. Restaurant Association* v. *Holderman*, 24 N.J. 295, 131 A.2d 773 (1957).

As indicated, the purpose of the tolling statute is to preserve a plaintiff's cause of action where service cannot be effected upon the defendant on account of nonamenability to process. *Lemke* v. *Bailey, supra* (Schettino, J., dissenting); *Ferraro* v. *Ferro Trucking Co., supra.* Nothing in the legislative history or court construction of N.J.S.A. 2A:14-22 supports plaintiffs' assertion that a purpose of the statute is to penalize foreign unlicensed corporations to encourage licensure.[18]

---

[18] While the sponsor's statement regarding the 1949 amendment indicated that the legislature intended to give the benefit of the statute of limitations to foreign licensed corporations, the language of the amendment is not so narrowly phrased as to deny unlicensed corporations a statute of limitations defense.

Appendix C

The effect of the foreign corporation section of the tolling statute is to distinguish between domestic and foreign corporations subject to service through representative agents within the state and foreign corporations subject to service under the long-arm rule. The former are entitled to plead the statute of limitations while the latter are denied its reprose. Since this difference in treatment bears no rational relationship to the object of the tolling statute, I find that the statute denies equal protection to foreign corporations amenable to long-arm jurisdiction.[19] ***Cf. Lemke*** **v.** ***Bailey, supra*** **41 N.J. at 305-06, 196 A.2d 523 (Schettino, J., dissenting).**

---

[19] While this holding is limited to corporate defendants, individuals are subject to long-arm jurisdiction in New Jersey, R.4:4-4 (e), and I agree with plaintiffs that "[t]here is no logical reason to treat corporate and individual defendants in a different manner." *Lackovic* v. *New England Paper Tube Co., Inc., supra,* 127 N.J. Super. at 398, 317 A.2d at 429. One court has held that it does not deny equal protection of the laws to apply a tolling statute to an individual defendant subject to substituted service pursuant to a nonresident motorist statute because of the latter statute's requirement of actual notice to the defendant for a personal judgment and the difficulty of locating an individual in another state. *Vaugn* v. *Deitz,* 430 S.W.2d 487 (Tex.1968). However, the burdens on plaintiffs found so onerous by that court are minimized in New Jersey practice. In New Jersey, an action is commenced by filing a complaint with the court, R. 4:2-2, and a summons is to be issued and served 10 days thereafter. R. 4:4-1. However, liberal relief is granted from the 10-day service rule where the plaintiff uses due diligence to find the defendant. *See Cooke* v. *Yarrington,* 62 N.J. 123, 299 A.2d 400 (1973); *X-L Liquors, Inc.* v. *Taylor,* 17 N.J. 444, 454, 111 A.2d 753 (1955). Thus, there is no prejudice to plaintiffs in requiring them to file a complaint within the limitations period where their cause of action will be preserved so long as they make reasonable efforts to find the defendant.

Appendix C

One who by law is subject to a state's jurisdiction is effectively present and represented within that state. *Hurwitch* v. *Adams*, 151 A.2d 286 (Del.Super.Ct.), *aff'd* 52 Del. 247, 155 A.2d 591 (1959); *Bolduc* v. *Richards*, 101 N.H. 303, 142 A.2d 156 (1958); *Snyder* v. *Clune*, 15 Utah 2d 254, 390 P.2d 915 (1964). Where the long-arm rule places an out-of-state defendant on an equal footing with a resident or represented one, there is no rational justification for differential treatment of such defendants with regard to the statute of limitations. While the tolling statue made eminent good sense in the days of territorial restrictions on service, it has become dated in the instant context by modern changes in the law of in personam jurisdiction. The infirmity which the statute has developed in the course of the aging process is over-permissiveness: until today it allowed a plaintiff to postpone indefinitely the assertion of his cause of action even though the defendant was subject to service. As a matter of fair judicial administration, where a defendant may be brought before the courts, he should be permitted to assert the statute of limitations to implement the important policies behind that statute to spare defendants from being put to a defense after evidence is lost, memories have faded and witnesses have died or disappeared and to deliver the courts from the litigation of stale and possibly fraudulent claims. *Union City Housing Authority* v. *Commonwealth Trust Co.*, 25 N.J. 330, 335, 136 A.2d 401 (1957). The instant holding brings New Jersey law[20] into conform-

[20] I express no view on the rule of *Lemke* v. *Bailey*, *supra*, but note that any defendant subject to service under the New Jersey nonresident motorist statute, N.J.S.A. 39:7-2, is also amenable to long-arm jurisdiction.

ity with the rule in the majority of the states[21] that amenability to process by substituted or long-arm service renders the tolling statute inapplicable.

In light of the above result, it will become necessary to resolve the second issue tendered by the motion of defendant for summary judgment—whether plaintiffs are entitled to the benefit of the "discovery" rule in bar of the statute of limitations. There will be no necessity to enter an order on the motion until that question is resolved.

---

[21] Of the 42 states which have considered the question, 38 take the majority position. *See* 94 A.L.R. 485 (1935); 119 A.L.R. 859 (1939); 17 A.L.R.2d 502 (1951); 55 A.L.R.3d 1158 (1974).

Contra:

New Jersey:

Lemke v. *Bailey*, 41 N.J. 295, 196 A.2d 523 (1963).

Ohio:

Couts v. *Rose*, 152 Ohio St. 458, 90 N.E.2d 139 (1950). However, the Ohio courts have taken a different approach to corporations. *See Partis* v. *Miller Equipment Co.*, 324 F.Supp. 898 (N.D.Ohio 1970), *aff'd*, 439 F.2d 262 (6th Cir. 1971).

S. Carolina:

Macri v. *Flaherty*, 115 F.Supp. 739 (E.D.S.C. 1953).

Texas:

Dietz v. *Vaughn*, 423 S.W.2d 113 (Civ.App. 1967), *aff'd*, 430 S.W.2d 487 (Tex. 1968).

Office-Supreme Court, U.S.
FILED
JUL 7 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G. D. SEARLE & COMPANY,

Petitioner,

v.

SUSAN COHN and WALTER COHN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

RAYMOND M. TIERNEY, JR.
SHANLEY & FISHER
550 Broad Street
Newark, New Jersey 07102
(201) 643-1220
Counsel for Petitioner

WALTER R. COHN
15 Valley Street
South Orange New Jersey 07079
(201) 762-6444
Counsel for Respondents

PETITION FOR CERTIORARI FILED OCTOBER 20, 1980.
CERTIORARI GRANTED APRIL 20, 1981

INDEX

	PAGE
Chronological List of Relevant Docket Entries	1a
Plaintiffs' Complaint, Filed January 29, 1974 in New Jersey Superior Court, Law Division	3a
Defendant's Answer, Filed March 14, 1974 in New Jersey Superior Court, Law Division	8a
Defendant's Motion for Summary Judgment, Filed July 18, 1975 in the United States District Court for the District of New Jersey	13a
Excerpts From *Plaintiffs'* [*First*] *Brief*, Submitted to the United States District Court	14a
Excerpts From *Plaintiffs'* [*Third*] *Brief*, Submitted to the United States District Court	16a
State by State Analysis of the Effect of an Absent Defendant's Continued Amenability to Service of Process Upon A State's Tolling Provision, Submitted by Defendant at Request of District Court	18a
The District Court's First Opinion, Filed March 22, 1978 and Reported at 447 F.Supp. 903 (D.N.J. 1978)	26a
The District Court's Second Opinion (unpublished), Filed July 23, 1980	49a
Judgment of Third Circuit Court of Appeals, Filed July 23, 1980	74a
N.J.Ct.R.4:4-4(c)(1)	76a
N.J.R.R.4:4-4(d)	77a
N.J.S.A.2A:14-2	78a
N.J.S.A.2A:14-22	79a

PAGE

The following opinion has been omitted in printing this appendix because it appears on the following page in the appendix to the printed petition for Certiorari:

Opinion of the Court of Appeals for the Second Circuit, dated July 28, 1980, and reported at 628 F.2d 801 ..... A1

JOINT APPENDIX

Chronological List of Relevant Docket Entries

January 29, 1974 —Plaintiffs' Complaint filed in the New Jersey Superior Court, Law Division, Essex County.

March 14, 1974 —Defendant's answer filed.

April 1, 1974 —Petition for Removal, Removal Bond and Notice of Removal filed in the United States District Court for the District of New Jersey.

July 15, 1975 —Depositions of plaintiffs Walter and Susan Cohn taken July 25, 1974, filed.

July 18, 1975 —Defendant's Notice of Motion for summary judgment filed.

September 8, 1975 —Hearing on defendant's motion for summary judgment.

March 22, 1978 —District Court opinion, holding that N.J.S.A. 2A:14-22 is unconstitutional, filed. (The opinion is published at 447 F.Supp. 903).

November 20, 1978—Defendant's Notice of Motion to schedule a hearing on the issue of whether plaintiffs are entitled to claim the benefit of the "discovery rule."

February 12, 1979 —Evidentiary hearing held on discovery rule issue.

Chronological List of Relevant Docket Entries

July 26, 1979 —District Court opinion granting defendant's motion for summary judgment filed.

August 6, 1979 —Order entered granting summary judgment in favor of defendant.

August 29, 1979 —District Court opinion and Order denying plaintiffs' motion to set aside the judgment.

August 29, 1979 —Plaintiff's motion for a new trial filed.

September 14, 1979—Plaintiff's Notice of Appeal filed.

October 18, 1979 —Order entered granting defendant's application for leave to file a cross appeal.

July 23, 1980 —Opinion and Judgment of the Court of Appeals for the Third Circuit.

Plaintiffs' Complaint, Filed January 29, 1974 in New Jersey Superior Court, Law Division

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY—LAW DIVISION
DOCKET NO. L15857-73
CIVIL ACTION

SUSAN COHN and WALTER R. COHN, her husband,
Plaintiff,

vs.

G.D. SEARLE & COMPANY,
Defendant.

Plaintiffs, Susan Cohn and Walter R. Cohn, residing at 972 Broad Street, in the City of Newark, County of Essex and State of New Jersey, complaining of Defendant says:

FIRST COUNT

1. The defendant is in the business of and manufactured, produced and sold an oral contraceptive pill known as "Enovid."

2. The said defendant G.D. Searle & Company, sold and distributed the said drug under the trade name of "Enovid" for the purpose and use as a birth control measure.

Plaintiffs' Complaint Filed January 29, 1974 in New Jersey Superior Court, Law Division

3. In the Spring of 1963, the plaintiff, Susan Cohn, did take and use the contraceptive pill known as "Enovid."

4. That as a result of the taking of the said contraceptive pill "Enovid" the plaintiff, Susan Cohn, was rendered seriously, grievously and permanently injured; that she required and will require extensive hospital and other medical care and attention; that she was and is incapacitated from attending her usual duties.

5. The negligence of the defendant G.D. Searle & Company, its servants, agents and/or employees, consisted of manufacturing, selling and distributing the aforesaid contraceptive pill "Enovid" without making proper and sufficient tests to determine the dangers and contraindications thereof; in failing to adequately warn the public and medical profession of the dangers and contraindications and side effects in the use of the aforesaid drug; in failing to properly inspect the aforesaid drug; in advertising and recommending the use of the aforesaid drug without sufficient knowledge as to its dangerous propensities; in failing to properly advertise the aforesaid drug to the public and medical profession; in representing that the aforesaid drug was safe for use for contraceptive and therapeutic purposes, when in fact said drug was unsafe for such use; that the said defendant had not conducted a sufficient testing program to determine whether or not the aforesaid drug was safe for use; that the defendant knew or should have known, in the exercise of reasonable diligence that said drug was unsafe and unfit for use by reason of their dangerous side effects, contraindications and insufficient testing; and that the said defendant was other-

Plaintiffs' Complaint Filed January 29, 1974 in New Jersey Superior Court, Law Division

wise negligent and careless in the premises; the said defendant produced a drug which was not of a merchantable quality and not fit for the particular use as prescribed said use being warranted as to its merchantability and quality by the producer.

WHEREFORE, Judgment will be claimed against the defendant for damages and costs of suit.

SECOND COUNT

1. The plaintiff repeats each and every allegation contained in the First Count as though fully set forth at length herein.

2. The said defendant herein represented and warranted that the aforesaid drug sold under the trade name of "Enovid" was safe and fit for use as a birth control and therapeutic drug; that it was of merchantable quality and did not produce any side effects dangerous to life and limb.

3. That in fact the aforesaid representations and warranties were false and untrue in that the said "Enovid" was not safe or fit for use as a birth control or therapeutic drug; that it was not of merchantable quality and in fact produced serious side effects and that it was contraindicated for certain people and was otherwise dangerous and unsafe.

4. That as a result of the aforementioned breach of warranty and breach of its representations, the plaintiff suffered serious and permanent damages.

Plaintiffs' Complaint Filed January 29, 1974 in New Jersey Superior Court, Law Division

WHEREFORE, Judgment will be claimed against the defendant for damages and costs of suit.

THIRD COUNT

1. The plaintiff repeats the allegations contained in the First Count and the Second Count as though fully set forth at length herein.

2. That by reason of the foregoing, the defendant G.D. Searle & Company, has violated statutes, codes, laws, ordinances and is liable to the plaintiff herein by reason of such statutory violations.

3. That by reason of the foregoing the plaintiff has been damaged and suffered severe and permanent injuries.

WHEREFORE, Judgment will be claimed against the defendant for damages and costs of suit.

FOURTH COUNT

1. Plaintiff repeats the allegations contained in the First, Second and Third Counts as though fully set forth at length herein.

2. That by reason of the foregoing, the defendant, G.D. Searle & Company, is liable to the plaintiff herein under the Doctrine of Strict Liability.

3. By reason of the foregoing, the plaintiff has sustained damages and suffered severe and permanent injuries.

Plaintiffs' Complaint Filed January 29, 1974 in New Jersey Superior Court, Law Division

WHEREFORE, Judgment will be claimed against the defendant for damages and costs of suit.

FIFTH COUNT

1. Plaintiff, Walter R. Cohn, was and still is the husband of the plaintiff, Susan Cohn.

2. That the said plaintiff, Walter R. Cohn, repeats all the allegations contained in the First, Second, Third and Fourth Counts as though fully set forth at length herein.

3. By reason of and as a result of the foregoing, the said plaintiff, Walter R. Cohn, was and is deprived of the services, society, consortium and companionship of the plaintiff Susan Cohn, and was caused to expend various and divers sums of money in an effort to cure the plaintiff, Susan Cohn, of her injuries and will be required to expend further sums of money in the future for said cure for the plaintiff, Susan Cohn, and this plaintiff was otherwise damaged.

WHEREFORE, Judgment will be claimed against the defendant for damages and costs of suit.

WALTER R. COHN
Attorney for Plaintiff and Pro Se

Defendant's Answer, Filed March 14, 1974 in New Jersey Superior Court, Law Division

[Caption Omitted in Printing]

The defendant, G. D. Searle & Co., by its attorneys, Shanley & Fisher, Esqs., answers the Complaint and says:

First Count

1. The defendant admits the allegations contained in paragraphs 1 and 2 of the First Count.

2. The defendant is presently without knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph 3 of the First Count.

3. The defendant denies the allegations contained in paragraphs 4 and 5 of the First Count.

Second Count

1. The defendant repeats and reiterates its answers to the allegations contained in the First Count as if the same were set forth at length herein.

2. The allegations contained in paragraph 2 of the Second Count are legal conclusions and, as such, are denied by the defendant.

3. The defendant denies the allegations contained in paragraphs 3 and 4 of the Second Count.

Defendant's Answer, Filed March 14, 1974 in New Jersey Superior Court, Law Division

THIRD COUNT

1. The defendant repeats and reiterates its answers to the allegations contained in the First and Second Counts as if the same were set forth at length herein.

2. The defendant denies the allegations contained in paragraphs 2 and 3 of the Third Count.

FOURTH COUNT

1. The defendant repeats and reiterates its answers to the allegations contained in the First, Second and Third Counts as if the same were set forth at length herein.

2. The defendant denies the allegations contained in paragraphs 2 and 3 of the Fourth Count.

FIFTH COUNT

1. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Fifth Count.

2. The defendant repeats and reiterates its answers to the allegations contained in the First, Second, Third and Fourth Counts as if the same were set forth at length herein.

3. The defendant denies the allegations contained in paragraph 3 of the Fifth Count.

Defendant's Answer, Filed March 14, 1974 in New Jersey Superior Court, Law Division

FIRST SEPARATE DEFENSE

The claim set forth in the Complaint is barred by the Revised Statutes of the State of New Jersey, more particularly, the Statute of Limitations, as said suit was not filed within the time period allowed by said statute.

SECOND SEPARATE DEFENSE

Any injury or damage which the plaintiff may have sustained was due to the act or acts of a third person or persons over whom the defendant had no control.

THIRD SEPARATE DEFENSE

Defendant, G. D. Searle & Co., violated no duty which may have owed to the plaintiffs.

FOURTH SEPARATE DEFENSE

Defendant, G. D. Searle & Co., denies that it breached any expressed or implied warranty.

FIFTH SEPARATE DEFENSE

Service of process was improper as provided, and as such this Court has no jurisdiction over defendant, G. D. Searle & Co.

Defendant's Answer, Filed March 14, 1974 in New Jersey Superior Court, Law Division

Sixth Separate Defense

Defendant, G. D. Searle & Co., further states that the product Enovid was and has been formulated, tested, manufactured, processed and labeled by the defendant, G. D. Searle & Co., in accordance with the provisions of the Federal Food, Drug and Cosmetic Act and regulations promulgated pursuant thereto.

Seventh Separate Defense

Defendant, G. D. Searle & Co., further states that the female plaintiff had a significant premonitory medical history which is the causative fact for her alleged illness, and it occurred only coincidentally, if at all, with her alleged use of Enovid.

Eighth Separate Defense

Defendant, G. D. Searle & Co., further states that the female plaintiff's alleged injury is wholly unrelated to her alleged use of Enovid, or that the alleged injury resulted from acts or occurrences for which this defendant is not liable or responsible.

Jury Demand

The defendant, G. D. Searle & Co., demands a trial by a jury of twelve (12) on all the issues involved herein.

Defendant's Answer, Filed March 14, 1974 in New Jersey Superior Court, Law Division

DEMAND FOR STATEMENT OF DAMAGES

The defendant, G. D. Searle & Co., demands a written statement of damages, within five (5) days, as provided by the Rules of Court.

SHANLEY & FISHER
Attorneys for Defendant
G. D. Searle & Co.
By /s/ RAYMOND M. TIERNEY, JR.

Defendant's Notice of Motion for Summary Judgment, Filed July 18, 1976 in the United States District Court

[Caption Omitted in Printing]

Sirs:

Please take notice that on the 8th day of September, 1975, at 10:00 a.m. in the forenoon or as soon thereafter as counsel may be heard, the undersigned, attorneys for defendant, G. D. Searle & Co., will move before the Honorable H. Curtis Meanor, Judge of the United States District Court for the District of New Jersey, at the Court House and Post Office Building in Newark, New Jersey, for an order granting said defendant summary judgment and dismissing the complaint, with prejudice, on the grounds that this action is barred by the applicable Statute of Limitations, 2A N.J.S.A. 14-2.

Please take further notice that reliance will be placed upon the brief annexed hereto, the depositions conducted in this action and the plaintiffs' answer to interrogatories.

Shanley & Fisher
Attorneys for Defendant
By Raymond M. Tierney, Jr.

Excerpts from *Plaintiffs' (First) Brief*, Submitted to the United States District Court

• • • Both plaintiffs Cohn, had become aware in or around 1970, that there was a possible connection between the taking of the "Enovid" and the C.V.A. However, plaintiff, Walter Cohn, as an Attorney, was not prepared at that point to bring suit on mere speculation. Both plaintiffs Cohn, diligently endeavored to establish a concrete casual link between "Enovid" and the C.V.A. of Susan Cohn. It was not until late 1973 however that plaintiff Walter Cohn, in his position as an Attorney, became convinced that the information that he had amassed, along with medical opinions of doctors, amounted to concrete evidence linking the taking of the "Enovid" to plaintiff Susan Cohn's C.V.A.

The *Lopez* Court noted that in certain situations it may be unjust to hold liability long after the alleged injury has occurred, as years of fading memories and lost witnesses may severely prejudice a defendant. (at 62 N.J. 275). Such is indeed not the instant case. The evidence linking "Enovid" to the C.V.A. of Mrs. Cohn, has only quite recently come to light. The *Lopez* Court at 276, mandated that:

> ". . . All relevant facts and circumstances, should be considered. The determinative factors may include but need not be limited to, the nature of the alleged injury, the availability of witnesses and written evidence, the length of time that has elapsed since the alleged wrongdoing, whether the delay has been to any extent deliberate or intentional, whether the delay may be said to have peculiarly or unusually prejudiced the defendant. The burden of proof will rest upon the party claiming the indulgence of the rule." (Footnote omitted)

Excerpts from Plaintiffs' (First) Brief, Submitted to the United States District Court

The instant situation is completely within the guidelines of the *Lopez* Court decision. The CVA of plaintiff, Susan Cohn, occurred at a time when she was in otherwise perfect health. The seriousness of her injuries could not very well have been attributed to the "Enovid" without concrete evidence. It was not until the latter portion of 1973 however that the medical evidence linking "Enovid" to the occurrence of CVA's came to light. Following the strength of this evidence, suit was filed with dispatch. The delay in filing suit from the time of the CVA was due solely to the lack of concrete evidence, and not due to any kind of concealment of evidence by the plaintiffs. Any delay in starting suit cannot be said to prejudice the defendant in any manner. Had defendant exercised greater care, and had defendant disclosed information known to it to both the public and the medical profession, regarding the possible hazardous effects of its "Enovid" product, and been more diligent in its testing procedures, it is possible plaintiffs could have discovered the cause of Susan Cohn's CVA prior to the latter portion of 1973. However due to the lack of definitive research and definitive medical opinion prior to the latter portion of 1973 it was not possible for the plaintiff to bring suit against defendant Searle on anything more than conjecture and weak opinion.

Excerpts from *Plaintiffs' (Third) Brief* Submitted to the United States District Court

Legal Argument

Point I

Where Plaintiff's Discovery of a Causal Connection Between Injury and Fault Pre-Dates or Coincides With Plaintiff's Disability as that Term is Used in N.J.S.A. 2A:14-21), the Statute of Limitations is Tolled Until Such Time as the Disability is Removed.

Plaintiffs allege that Susan Cohn's use of the drug manufactured by Defendant was the cause of her injury which resulted in the cerebral vascular accident (C.V.A.) and subsequent paralysis of her left side, arm and leg. Plaintiffs contend that there exists a causal connection between the injury sustained and the ingestion of Defendant's drug, and that the date of the discovery of the causal connection was during the last months of 1969. The C.V.A. occurred on December 22, 1963. The Complaint was filed January 29, 1974, clearly over two years after the injury. Notwithstanding the dictates of N.J.S.A. 2A:14-2, which prescribes the two year limitation for commencement of negligence actions. Plaintiffs argue that this Court should invoke the equitable discovery rule enunciated in *Lopez* v. *Swyer*, 62 N.J. 267, 300 A.2d 563 (1973) and its progeny.

The rule is now well settled in New Jersey that the two-year Statute of Limitations on a medical malpractice action

• • •

• • •

> Now it was not until the latter part of 1973 that I was able to talk to her about it. And she did give me consent to file the lawsuit at that time."
>
> (Transcript from Hearing Before Trial, February 12, 1979, Page 58, Line 1.)

Excerpts from Plaintiffs' (Third) Brief Submitted to the United States District Court

For the purposes of this Brief, Plaintiffs' assume this Court will accept the contention that discovery occurred in 1969-1970. The issue then crystalizes into whether or not Plaintiffs' suit should be barred for failure to bring the lawsuit within two years of the date of discovery.

Plaintiffs allege that on or about the date of discovery, Susan Cohn was suffering from a severe depression. As a direct consequence of her depression she was undergoing classical symptoms of denial of her illness (See testimony of Walter R. Cohn, February 12, 1979, p. 69), which was characterized by an adamant hostility toward any discussion of the events surrounding it. At that time, her state of mind was one of severe depression, as evidenced by the reports of her doctors which are in Evidence.

Plaintiffs contend that Susan Cohn's state of mind constitutes a disability which should serve to toll the statute of limitations. Reliance is placed upon *Kyle* v. *Green Acres at Verona, Inc.*, 44 N.J. 100, 207 A.2d 513 (1965). In *Kyle* the Plaintiff fell on Defendant's icy sidewalk and sustained a fractured hip. After release from hospitalization for her hip injury she was admitted to a nursing home. From there

• • •

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

APPENDIX

Pursuant to the trial court's request, defendant submitted a state by state analysis of the effect of an absent defendant's continued amenability to service of process upon a state's tolling provision. The states which follow the majority position, that a statute of limitations is not tolled by the defendant's absence when the defendant remains amenable to service of process, are:

ALABAMA:

Peters v. *Tuell Dairy Co.*, 250 Ala. 600, 35 So.2d 344 (1948); *Dedmon* v. *Falls Products, Inc.*, 299 F.2d 173 (5th Cir 1962).

ALASKA:

Byrne v. *Ogle*, 488 P. 2d 716 (Ala. 1971).

ARIZONA:

Phillips v. *Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966); *Hawkinson Tire Co.* v. *Paul E. Hawkinson Co.*, 13 Ariz. App. 343, 476 P.2d 864, *aff'd.*, 107 Ariz. 255, 485 P.2d 825 (1970); *Selby* v. *Kurman*, 110 Ariz. 522, 521 P.2d 609 (1974).

CALIFORNIA:

Bigelow v. *Smik*, 6 C.A. 3d 10, 85 Cal. Rptr. 613 (1970); *Raynolds* v. *Volkswagenwerk Aktiengesellschaft*, 275 C.A. 2d 997, 80 Cal. Rptr. 610 (1969); *Rios* v. *Torvald Klaveness*, 2 C.A. 3d 1077, 83 Cal. Rptr. 150 (1969).

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

COLORADO:

Norton v. *Dartmouth Skiis, Inc.*, 147 Col. 436, 364 P.2d 866 (1961) (where the Court held that a foreign, non-resident corporation that was not registered to do business in Colorado was nevertheless *present* because of its salesmen in the state and could successfully plead the statute of limitations).

CONNECTICUT:

Coombs v. *Darling*, 116 Conn. 643, 166 A.70 (1933); *Kilburn* v. *Keenan*, 27 Conn. Sup. 394, 240 A.2d 213 (1967).

DELAWARE:

Hurwitch v. *Adams*, 52 Del. 13, 151 A.2d 286 *aff'd.*, 52 Del. 247, 155 A.2d 591 (1959).

FLORIDA:

Friday v. *Newman*, 183 So.2d 25 (Fla. App. 1966); *cert. dism.* 189 Co. 2d 629 (Fla. (1967).

GEORGIA:

Railey v. *State Farm Mutual Auto. Ins.*, 129 Ga. App. 875, 201 S.E. 2d 628 (1973).

IDAHO:

Lipe v. *Javelin Tire Co., Inc.*, 96 Idaho 723, 536 P.2d 291 (1975).

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

ILLINOIS:

Nelson v. *Richardson*, 295 Ill. App. 504, 15 N.E.2d 17 (1938); *Rivera* v. *Taylor*, 61 Ill. 2d 406, 336, N.E.2d 481 (Ill. 1975).

INDIANA:

American States Insurance Co. v. *Williams*, 29 Ind. Dec. 135, 278 N.E. 2d 295 (1972).

IOWA:

Rorenge v. *Holthaus*, 243 Iowa 571, 52 N.W. 2d 711 (1952); *Fulmer* v. *Debel*, 216 N.W. 2d 789 (Iowa 1974).

KANSAS:

Bond v. *Golden*, 273 F.2d 265 (10th Cir. 1959).

MARYLAND:

Jolivet v. *Elkins*, 386 F. Supp. 261 (D. Md. 1974) (where the district court indicated that since the defendant individuals were subject to long-arm service, the tolling statute would not apply).

MASSACHUSETTS:

Walsh v. *Ogorzalek*, 361 N.E. 2d 1247 (Mass. 1977)

MICHIGAN:

Hammell v. *Bettison*, 362 Mich. 396, 107 N.W. 2d 887 (1961); *Melville* v. *Kelleher*, 22 Mich. App. 251, 177 N.W. 2d 238 (1970);

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

MINNESOTA:

Long v. *Moore,* 295 Minn. 266, 204 N.W. 2d. 641 (1973).

MISSISSIPPI:

Dent v. *Jones & Pintard,* 50 Miss. 265 (1874) ("if process can be served, absence should not be deducted to save the bar of the statute.")

MISSOURI:

Haver v. *Basset,* 287 S.W.2d 342 (Mo. App. 1956).

MONTANA:

Baker v. *Ferguson Research Inc.,* 61 F.R.D. 637 (D. Mont. 1974).

NEBRASKA:

Gatliff v. *Little Audrey's Transportation Co., Inc.,* 317 F. Supp. 1117 (D. Neb. 1970).

NEVADA:

Cal-Farm Insurance Co. v. *Oliver,* 78 Nev. 479, 375 P.2d 857 (1962); *Blotzke* v *Christmas Tree, Inc.,* 88 Nev. 449, 499 P.2d 647 (1972).

NEW HAMPSHIRE:

Bolduc v. *Richards,* 101 N.H. 303, 142 A.2d 156 (1958); *Hatch* v. *Hooper,* 101 N.H. 214, 138 A.2d 671 (1958).

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

NEW MEXICO:

Benally v. *Pigman*, 78 N.M. 189, 429 P.2d 648 (1967).

NEW YORK:

Yarusso v. *Arbotowicz*, 41 N.Y.2d 516, 362 N.E.2d 600 (1977).

NORTH CAROLINA:

Volivar v. *Richmond Cedar Works*, 152 N.C. 656, 68 S.E. 200 (1910) (if a personal judgment can be obtained against a foreign corporation then such corporation is not equal to a non-resident); *Smith* v. *Finance Co. of America*, 207 N.C. 367, 177 S.E. 183 (1934) (where a non-resident, foreign corporation not registered to do business was effectively served by service upon the Secretary of State, the tolling provision was in inapplicable). Check 224 S.E. 243, 2d 226 S.E. 513; 221 S.E. 2d 895.

OHIO:

Partis v. *Miller Equipment Co.*, 324 F. Supp. 898 (N.D. Ohio 1970), *aff'd.*, 439 F.2d 262 (6th Cir. 1971).

OKLAHOMA:

Walker v. *L.E. Meyers Construction Co.*, 175 Okla. 548, 53 P.2d 547 (1938); *Jarchow* v. *Eder*, 433 P. 2 942 (Okla. 1967).

OREGON:

Whittington v. *Davis*, 221 Or. 209, 350 P.2d 913 (1960); *Winters* v. *Jacobsen*, 221 Or. 214, 350 P.2d 1078 (1960).

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

NEW MEXICO:

Benally v. *Pigman*, 78 N.M. 189, 429 P.2d 648 (1967).

NEW YORK:

Yarusso v. *Arbotowicz*, 41 N.Y.2d 516, 362 N.E.2d 600 (1977).

NORTH CAROLINA:

Volivar v. *Richmond Cedar Works*, 152 N.C. 656, 68 S.E. 200 (1910) (if a personal judgment can be obtained against a foreign corporation then such corporation is not equal to a non-resident); *Smith* v. *Finance Co. of America*, 207 N.C. 367, 177 S.E. 183 (1934) (where a non-resident, foreign corporation not registered to do business was effectively served by service upon the Secretary of State, the tolling provision was in inapplicable). Check 224 S.E. 243, 2d 226 S.E. 513; 221 S.E. 2d 895.

OHIO:

Partis v. *Miller Equipment Co.*, 324 F. Supp. 898 (N.D. Ohio 1970), *aff'd.*, 439 F.2d 262 (6th Cir. 1971).

OKLAHOMA:

Walker v. *L.E. Meyers Construction Co.*, 175 Okla. 548, 53 P.2d 547 (1938); *Jarchow* v. *Eder*, 433 P. 2 942 (Okla. 1967).

OREGON:

Whittington v. *Davis*, 221 Or. 209, 350 P.2d 913 (1960); *Winters* v. *Jacobsen*, 221 Or. 214, 350 P.2d 1078 (1960).

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

PENNSYLVANIA:

Will v. *Malosky*, 432 Pa. 240, 247 A.2d 788 (1968).

SOUTH DAKOTA:

Busby v. *Shafer*, 75 S.D. 428, 66 N.W. 2d 910 (1954).

TENNESSEE:

Arrowood v. *McMinn County*, 173 Tenn. 562, 121 S.W. 2d 566 (1938); *Young* v. *Hicks*, 250 F.2d 80 (8th Cir. 1957).

UTAH:

Snyder v. *Clune*, 15 Utah 2d 254, 390 P.2d 915 (1964).

VERMONT:

Reed v. *Rosenfield*, 115 Vt. 76, 51 A.2d 189 (1974); *Law's Admir.* v. *Culver*, 120 Vt. 285, 155 A.2d 885 (1959).

VIRGINIA:

Bergman v. *Turpin*, 206 Va. 539, 145 S.E.2d 135 (1965).

WASHINGTON:

Smith v. *Forty Million, Inc.*, 64 Wash. 2d 912, 395 P.2d 201 (1964); *Summerrise* v. *Stephens*, 75 Wash. 2d 808, 454 P.2d 224 (1969).

WEST VIRGINIA:

Kisner v. *Fiori*, 151 W.Va. 850, 157 S.E.2d 238 (1967) (where the Court in determining whether the state

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

Non-resident Motorist Statute applied prospectively assumed that had it so applied the tolling statute would not have been applicable to the nonresident, individual who had an automobile accident within the state.).

WISCONSIN:

Wisc. Stat. Ann. §893.30 (1969) effectively overruled the old case of *Bode* v. *Flynn,* 213 Wis. 509, 252 N.W. 284 (1934).

WYOMING:

Tarter v. *Insco,* 550 P.2d 905 (Wyo. 1976)

Only four states continue to adhere to the view that where a nonresident defendant individual is amenable to service of process such defendant may not plead the bar of the statute of limitations. These states are:

NEW JERSEY:

Lemke v. *Bailey,* 41 N.J. 295, 196 A.2d 523 (1963).

OHIO:

Couts v. *Rose,* 152 Ohio St. 458, 90 N.E.2d 139 (1950). However, the Ohio courts have taken a different approach to corporations. See *Partis* v. *Miller Equipment Co., supra.*

SOUTH CAROLINA:

Macri v. *Flaherty,* 115 F. Supp. 739 (E.D.S.C. 1953).

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

TEXAS:

Dietz v. *Vaughn*, 423 S.W. 2d 113 (Civ. App. 1967), *aff'd.*, 403 S.W. 2d 487 (Tex. 1968).

Of the remaining states and the District of Columbia in which tolling statutes are in effect, the statutes in force in the District of Columbia, and Kentucky are inapplicable to nonresidents. Those states' statutes only apply to defendants who are residents at the time the cause of action accrues and subsequently leave the state or conceal themselves within it. The Arkansas provision specifically provides that "[T]his act and all other acts of limitations shall apply to non-residents, as well as to residents of this State." *Ark. Stat. Ann.* §37-230. In the following states there exist tolling statutes, but either no or insufficient case law exists to adequately determine how these states would construe their tolling statutes: Hawaii, Maine, North Dakota, and Rhode Island. We could find no statute or case dealing with the subject at hand from Louisiana.

First Opinion of the United States District Court for the District of New Jersey, Filed March 22, 1978

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL ACTION No. 74-450

SUSAN COHN and WALTER COHN, her husband,

Plaintiffs,

v.

G. D. SEARLE & COMPANY,

Defendant.

Appearances:

Walter R. Cohn, Esq.
Attorney for Plaintiffs.

Shanley & Fisher, Esqs.
Attorneys for Defendant.
BY: Raymond M. Tierney, Jr., Esq.
Robert L. Dughi, Esq.

MEANOR, District Judge.

This matter comes before the court on defendant's motion for summary judgment. For reasons stated hereinafter, the issues presented by this motion will be treated

in two stages. This first opinion is addressed to the question whether the defendant is entitled to the benefit of the statute of limitations. The resolution of the issue turns on the construction and application of the New Jersey tolling statute to a foreign unlicensed corporate defendant which, from the time of the occurrence of the injury alleged in the instant complaint, had no formal presence within New Jersey yet remained amenable to long-arm service.

If it is determined that the defendant has available to it the defense of the statute of limitations, then it will be necessary to decide whether the plaintiffs are entitled to the "discovery" exception to strict application of the statute.

Plaintiffs Susan and Walter Cohn have brought this suit against G. D. Searle & Co. (hereinafter "Searle"), the manufacturer of the oral contraceptive Enovid, for personal injury and per quod damages allegedly resulting from Mrs. Cohn's use of the drug. Mrs. Cohn commenced taking the contraceptive in the spring of 1963 and continued its use until December 22, 1964. On that date she suffered a stroke, or cerebral vascular accident (C.V.A.), when a blood clot lodged in the circulatory system of her brain. The C.V.A. required surgery, long hospitalization and rehabilitative therapy and resulted in permanent physical injury.

From the sparse information before me at this time it appears that in 1964 little or nothing was known about potential coagulant side effects of oral contraceptives. However, from at least 1966 the medical literature and the lay press increasingly reported work which suggested a

relationship between oral contraceptives and abnormal blood clotting. Sometime between 1966 and late 1973 the Cohns became aware of the possible link between Mrs. Cohn's C.V.A. and ingestion of Enovid. They initiated suit against Searle on January 29, 1974. Their complaint, predicated on theories of negligence, breach of warranty, statutory violations and strict liability, was filed in the Superior Court of New Jersey, Law Division, Bergen County. Service was effected on Searle under the long-arm rule. On April 1, 1974 the case was removed to this court pursuant to 28 U.S.C. § 1441. Jurisdiction is vested under 28 U.S.C. § 1332.

At all times relevant to this action the plaintiffs have been residents of New Jersey. Searle is a Delaware corporation with its principal place of business in Illinois. Prior to December 30, 1960 Searle was registered to do business in New Jersey, but on that date it formally withdrew from the state. However, from 1964 to 1974, the period between Mrs. Cohn's C.V.A. and the filing of the instant complaint, Searle retained in its employ some four dozen persons known as Medical Service Representatives or "detailmen" who worked and, in most cases, resided in New Jersey. The function of these detailmen was to call on physicians to discuss Searle's pharmaceutical products.

Searle moves for summary judgment on grounds that plaintiff's cause of action is time-barred under the relevant two-year statute of limitations, N.J.S.A. 2A:14-2 (1952).[1] Searle Acknowledges that plaintiffs may have

---

[1] N.J.S.A. 2A:14-2 provides:

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

some relief from the strict two-year limit under the New Jersey "discovery" rule. *Fernandi* v. *Strully*, 35 N.J. 434 (1961); *Lopez* v. *Swyer*, 62 N.J. 267 (1973). Nevertheless, Searle asserts that the Cohns had reason to know of the cause of action against Searle no later than 1970, and, therefore, their claims are precluded.

Plaintiffs respond that their action is timely because the causal relationship between contraceptives and clotting was not definitively demonstrated until late 1973, and that in any case the New Jersey tolling statute, N.J.S.A. 2A:14-22 (1952),[2] deprives Searle of the statute of limitations

---

[2] N.J.S.A. 2A:14-22 provides:

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

because Searle is a foreign corporation not represented within the state by "any person or officer" upon whom process could be served within the meaning of the tolling statute. Searle retorts that the tolling statute is inapplicable because Searle was effectively represented within the state by its detailmen, or alternatively, by virtue of the fact that from the date of the C.V.A. onward it was subject to New Jersey long-arm jurisdiction. Finally, if the tolling statute, as interpreted by the New Jersey courts, is deemed to apply to a foreign corporation amenable to long-arm service, Searle asserts that the statute as applied violates the equal protection and due process clauses of the United States Constitution. Thus, the questions presented by this motion are whether Searle is entitled to the benefit of the statute of limitations, and if so, whether the plaintiffs' action is timely upon application of the "discovery" rule even though the instant complaint was filed over nine years after the injury to Mrs. Cohn. I shall consider the statute of limitations issue here. Because I find Searle is entitled to a statute of limitations defense, I must reach the second question, but I leave it for another day.[3]

---

[3] The parties are still negotiating over the terms of a submission, if necessary, on the discovery issue. In the New Jersey courts resolution of that issue would take place without a jury, *Lopez* v. *Swyer, supra,* but here jury trial exists as a matter of right. *Goodman* v. *Mead Johnson & Co.,* 534 F.2d 566 (3d Cir. 1976). I understand that the parties are willing to submit the discovery question to me on the existing written record without an evidentiary hearing and, of course, without jury trial. I am willing to accept it on that basis. However, I am informed that the defendant seeks to exact from the plaintiffs an agreement that

(Footnote continued on following page)

First Opinion of the United States District Court for the District of New Jersey, Filed March 22, 1978

At the heart of the issue of whether Searle has a statute of limitations defense is the construction and application of the tolling statute. N.J.S.A. 2A:14-22 provides in relevant part:

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8 . . . is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or *if any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which* such person . . . is not residing within this state or *such corporation . . . is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section.* The person entitled to any such action may commence the same after the accrual of the cause

---

(Footnote continued from preceding page)

any facts found as a result of such a submission of the issue be reviewed on appeal by the "clearly erroneous" standard of Rule 52(a), F.R.Civ.P., rather than to permit the Court of Appeals to review such fact determinations without the constraints of the clearly erroneous standard. *See Government of Virgin Islands v. Gereau*, 523 F.2d 140, 145-146 (3d Cir. 1975).

First Opinion of the United States District Court for the District of New Jersey, Filed March 22, 1978

> therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

(Emphasis supplied.) The statute exempts from its effect foreign corporations represented in the state by "any person or officer" upon whom process may be served.

It is undisputed that Searle has had no statutory or appointed agent in New Jersey at any time from the date of Mrs. Cohn's C.V.A. Nevertheless, Searle first argues that it is within the foreign corporation exception because it was represented by detailmen who are "persons or officers" within the meaning of the tolling statute. The rules pertaining to service on foreign corporations from the date of Mrs. Cohn's injuries are R.R. 4:4-4(d) (effective Sept. 3, 1958) and its successor R. 4:4-4(c)(1) (effective Sept. 8, 1969) (current version). Searle notes that under these rules jurisdiction may be obtained over a foreign corporation "by serving any servant of the corporation within this state acting in the discharge of his duties." Searle argues that the tolling statute must be construed to be consistent with the service rules during the time period relevant to this action, and since personal jurisdiction could have been obtained over Searle by serving a detailman in the discharge of his duties, representation by detailmen during the period was sufficient to stay the tolling of the statute of limitations.

Searle's argument is not persuasive for two reasons. First, Searle's proposed construction of the foreign corporation exception to the tolling statute is inconsistent with the manifest purpose of the statute itself. That enactment was intended to protect plaintiffs in New Jersey

courts[3a] by preserving their causes of action where service could not be had upon a defendant on account of absence from the state. *Lemke* v. *Bailey*, 41 N.J. 295, 303 (1963) (Schettino, J., dissenting); *Ferraro* v. *Ferro Trucking Co.*, 72 N.J.Super. 519, 524 (Law Div. 1962). Searle's detailmen operated out of their homes because Searle had no office within this state. They reported to Searle's office in Skokie, Illinois. Their function was to talk to New Jersey doctors about Searle's products to advertise them and generate good will for the company. Searle does not assert that they had any power to make contracts or place orders. Thus, the detailmen had minimal association with Searle in the public eye and had very limited authority to act on behalf of the company. It is inconceivable, in light of the purpose of the tolling statute, that the legislature intended to give the benefit of the statute of limitations to a foreign corporate defendant whose only representation within the state was by employees so invisible as these.

The second reason that Searle's rationale is not convincing is that it incorporates into the tolling statute changes in the law which were made after the act's passage. Narrowly drawn statutory language must be interpreted from the intent of the legislature in light of

---

[3a] The courts of New Jersey have found that the tolling statute operates to the benefit of residents and nonresident plaintiffs whose causes of action have accrued within the state. *Goran* v. *Trade Bank & Trust Co.*, 109 N.J.Super. 271 (App. Div. 1970); *Marsh* v. *Davis*, 99 N.J.Super. 130 (Law Div. 1968). However, in a subsequent opinion which failed to mention *Goran* the Third Circuit has held that the tolling statute protects only New Jersey residents. *Zelson* v. *Thomforde*, 428 F.2d 1360 (3d Cir. 1970).

circumstances at the time of enactment. 2A *Sutherland*, Statutory Construction § 49.02 (4th Ed. 1873). "A new meaning may not be given the words of an old statute in consequence of changed conditions probably not foreseen by the Legislature." *Fidelity Deposit Co. of Maryland* v. *Abagnale*, 97 N.J.Super. 132, 143-44 (Law Div. 1967). The present tolling statute has its origins in an enactment of the Council and General Assembly of New Jersey on February 21, 1820. The foreign corporations exception was added by amendment in 1949.[4] The only legislative history relating to the 1949 amendment is the introductory statement of the bill's sponsor, Assemblyman Mackey, which provides:

> Foreign corporations licensed to do business in New Jersey are now deprived by judicial construction of the benefit of the Statute of Limitations. The purpose of this bill is to correct that situation. New York State found it necessary to make a similar change in its laws in view of recent court decisions.

The import of this statement of legislative purpose is far from unambiguous, but it sheds some illumination on the phrase "any person or officer" as used in the tolling statute.

An understanding of Mackey's introductory statement requires an analysis of the New York law to which it refers. In 1949 New York's tolling statute was C.P.A. § 19, which had most recently been amended in 1943.

---

[4] Act of May 18, 1949, 1949 N.J.Laws, ch. 125 (amending N.J.R.S. 2:24-7 (1937); current version at N.J.S.A. 2A:14-22).

First Opinion of the United States District Court for the District of New Jersey, Filed March 22, 1978

Before 1943, § 19 had included an exception[5] from the tolling statute for persons or corporations with a designated agent for the service of process and foreign corporations with officers who might be served within the state. The 1943 amendment[6] to § 19 enlarged the excep-

---

[5] Before 1943 C.P.A. § 19 provided in pertinent part:

> But this section does not apply while a designation made in pursuance of law of a resident of the state on whom a summons may be served for another person or corporation remains in force. Nor does this section apply while a foreign corporation has had or shall have one or more officers in the state on whom a summons for such corporation may be served.

N.Y.C.P.A. § 19 (1920), *as amended by* Act of Apr. 5, 1928, 1928 N.Y.Laws, ch. 809 (current version at N.Y.Civ.Prac.Law (McKinney) § 207 (1972)).

[6] The amendment provided in pertinent part:

> But this section does not apply in either of the following cases:
>
> 1. while a designation or appointment, voluntary or involuntary, made in pursuance of law, of a resident or nonresident person, corporation, or private or public officer on whom a summons may be served within the state for another resident or nonresident person or corporation with the same legal force and validity as if served personally on such person or corporation within the state, remains in force.
>
> 2. while a foreign corporation has had or shall have one or more officers or other persons in the state on whom a summons for such corporation may be served.

Act of Apr. 3, 1943, 1943 N.Y.Laws, ch. 263.

tion to include persons or corporations with agents for service of process designated by statute or appointment and foreign corporations with "officers or other persons" who might be served. The revision notes appended to the amendment indicate that the foreign corporation exception was broadened to include persons besides officers who were servable pursuant to C.P.A. § 229. At that time, C.P.A. § 229,[7] governing service on nonresidents engaging in business in New York State, permitted service on the person in charge of any business in which the defendant was engaged within the state. Interpreting the language of the 1943 amendment to C.P.A. § 19 in light of C.P.A. § 229, it appears that at most the amendment broadened New York's foreign corporation exemption to include companies represented within the state by statutory or appointed agents, officers or business managers. Since the New Jersey Legislature intended in 1949 to adopt a tolling exemption similar to New York's, the New Jersey Legislature could not have intended that an employee with no managerial authority, such as a detailman, could be a

---

[7] C.P.A. § 229 at that time provided in pertinent part:

> When any natural person or persons not residing in this state shall engage in business in this state, in any action against such person or persons arising out of such business, the summons may be served by leaving a copy thereof with the complaint with the person who at the time of service is in charge of any business in which the defendant or defendants are engaged within this state. . . .

Act of Apr. 15, 1941, 1941 N.Y.Laws, ch. 455, *amending* N.Y.C. P.A. § 229 (1920) (repealed 1962).

representative sufficient to bring a foreign corporation out of the tolling statute.[8]

This conclusion is strengthened by reference to the law in New Jersey regarding service on foreign corporations at the time of enactment of the New Jersey foreign corporation exemption. In 1948, a year before the tolling statute amendment, the legislature amended N.J.R.S. 2:26-43 and 44[9] providing for service on corporations. Those amend-

---

[8] Mackay's introductory statement to the 1949 amendment to the New Jersey tolling statute indicated that New York had amended its tolling statute in a similar fashion in response to recent court decisions. Research has disclosed no significant cases prior to 1943 regarding persons through whom a foreign corporation might be served. However, section 1 of the 1943 amendment to C.P.A. § 19, n. 5 *supra*, was adopted specifically to alter the rule of *Maguire* v. *Yellow Taxicab Corp.*, 253 A.D. 249, 1 N.Y.S.2d 749, *rehearing denied*, 253 A.D. 890, 2 N.Y.S.2d 1021, *aff'd mem.*, 278 N.Y. 576, 16 N.E.2d 110 (1938), which held that amenability to process through the Director of Motor Vehicles did not exempt a nonresident defendant from the tolling statute. These facts suggest that the New Jersey Legislature may well have intended that representation by a statutory agent within the state would be sufficient to satisfy the tolling statute's foreign corporation exemption. *Ferraro* v. *Ferro Trucking Co.*, 72 N.J.Super. 519 (Law Div. 1962). *But see, Whalen* v. *Young*, 28 N.J.Super. 543 (Law Div. 1953), *reversed on other grounds*, 15 N.J. 321 (1954); *Lackovic* v. *New England Paper Tube Co., Inc.*, 127 N.J.Super. 394 (Law Div. 1974). *Cf. Lemke* v. *Bailey, supra.*

[9] The 1948 amendment to N.J.R.S. 2:26-43 and 44 (1937) (repealed 1951) provided:

> 2:26-43. Domestic corporations in personal actions; personal or substituted service of summons.

(Footnote continued on following page)

ments permitted acquisition of personal jurisdiction over foreign corporations by service on an officer, director, trustee, managing or general agent or agent by appointment or by law for the service of process. A detailman with minimal agency powers could not be considered a managing or general agent, nor any other individual within the statutory list. Since in 1949 personal jurisdiction over a foreign corporation could not have been obtained by serving a detailman, the legislature could not have intended an exemption from the tolling provision for an entity represented by such an employee. Searle urges that N.J.S.A. 2A:14-22 be interpreted as consistent with the rule regard-

---

(Footnote continued from preceding page)

Service of a summons in a civil action commenced against a domestic corporation in any of the courts of this State may be made by delivering a copy thereof to an *officer, director, trustee or a managing or general agent of the corporation* personally, or by leaving a copy thereof at his dwelling house or usual place of abode with some competent member of his family of the age of fourteen years or over then residing therein, or by delivering a copy thereof to any person authorized by appointment or by law to receive service of process on behalf of the corporation, or by leaving a copy thereof at the registered office of the corporation with any person in charge thereof.

2:26-44. Foreign corporations.

Service of a summons in a civil action commenced against a foreign corporation may be made in the same manner as is provided in section 2:26-43 of the Revised Statutes for service of summons upon a domestic corporation.

Act of Sept. 10, 1948, 1948 N.J.Laws, ch. 356.

ing service of process at the time of plaintiff's injury. Such an approach would be inappropriate, however, since the reach of service was substantially expanded in 1953, *Wright* v. *News Syndicate Co., Inc.*, 35 N.J. Super. 133, 135 (Law Div. 1955), a change which the legislature could not have anticipated in 1949.

Searle next takes the position that because Searle was at all times relevant to the instant complaint amenable to long-arm service,[10] it was represented within the state within the meaning of the tolling statute. The effect of amenability to long-arm jurisdiction on N.J.S.A. 2A:14-22 is a novel question heretofore not considered by the courts.

A number of courts have considered the construction of the New Jersey tolling provisions in light of a defendant's amenability to service through the Director of Motor Vehicles under the nonresident motorist statute, N.J.S.A. 39:7-2 (1973).[11] In leading case, *Lemke* v. *Bailey, supra,* the

---

[10] New Jersey does not have a long-arm statute because under the New Jersey Constitution of 1947, the Supreme Court has exclusive rule-making power over practice, procedure and administration of the courts. *Winberry* v. *Salisbury,* 5 N.J. 240 (1950). From 1963 to 1974, long-arm service was available over Searle pursuant to the court rules. R.R. 4:4-4(d) (effective Sept. 3, 1958); R. 4:4-4(c)(1) (effective Sept. 8, 1969) (current version).

[11] Holding that amenability to service through the Director of Motor Vehicles does not entitle a nonresident defendant to the benefit of the statute of limitations are *Gotheiner* v. *Lenihan,* 20 N.J.Misc. 119, 25 A.2d 430 (Sup.Ct. 1942); *Whalen* v. *Young,* 28 N.J.Super. 543 (Law Div. 1953), *rev'd on other grounds,* 15 N.J. 321 (1954); *Lemke* v. *Bailey, supra; Lackovic* v. *New England Paper Tube Co.,* 127 N.J.Super. 394 (Law Div. 1974); *Blackmon* v. *Govern,* 138 F.Supp. 884 (D.N.J. 1956). *Contra, Ferraro* v. *Ferro Trucking Co., supra.*

First Opinion of the United States District Court for the District of New Jersey, Filed March 22, 1978

New Jersey Supreme Court held that the tolling statute deprived a nonresident individual defendant of the benefit of the statute of limitations even though the defendant had been subject to service pursuant to N.J.S.A. 39:7-2. Searle argues that *Lemke* should not be considered controlling here because the Supreme Court specifically reserved the question of the effect of availability of substituted service upon a corporate defendant, and, in any case, there the court relied heavily on legislative acquiescence in, and plaintiffs' reliance on, prior court interpretation of the relationship betwen 2A:14-22 and 39:7-2, which consideration would be irrelevant to the novel question here presented. Plaintiffs urge that *Lemke* should be read broadly to hold that the statute of limitations does not run against a nonresident individual, and that *Lemke* binds the court here because there is no reason to treat individual and corporate defendants differently.[12]

---

[12] Plaintiffs cite two cases for the proposition that the tolling statute deprives a nonresident defendant of a statute of limitations defense despite amenability to substituted service. *Kenny* v. *Duro-Test Corp.*, 91 F.Supp. 633 (D.N.Y. 1950); *Mann* v. *Morristown Memorial Hospital*, Civ. No. L-23529-64 (N.J.Super., Law Div., filed Aug. 6, 1965, dismissed by consent Mar. 6, 1968). Neither case supports plaintiffs' argument. *Kenny* held that under the tolling statute a foreign licensed corporation could not plead the statute of limitations despite the fact that it was servable within the state. However, the court indicated that the 1949 foreign corporation exemption was only prospective in effect and therefore inapplicable to that case. *Id.* at 635-36.

On the other hand, the facts in *Mann* do not support the reading that plaintiffs give to its result. *Mann* was a malpractice

(Footnote continued on following page)

First Opinion of the United States District Court for the District of New Jersey, Filed March 22, 1978

Amenability to long-arm service cannot be deemed to constitute representation within the state for the very same reason that the foreign corporation exemption is not triggered by the presence within the state of servants acting in the discharge of their duties. The narrow foreign corporation exception must be considered in light of legislative intent at the time of enactment. The tolling statute exemption was adopted in 1949. Although the Supreme Court had held four years earlier that the reach of state

---

(Footnote continued from preceding page)

action against a hospital and two doctors. The plaintiff was treated by the defendants until June 1963, when his cause of action accrued. *Tortorello* v. *Reinfeld*, 6 N.J. 58, 66 (1950). He filed his complaint on Aug. 6, 1965. Summary judgment was granted to two defendants on statute of limitation grounds, but denied as to Dr. Matthews, who had moved from New Jersey in August 1963 and been served under the long-arm rule. Plaintiffs herein assert that Matthews had been subject to long-arm service from the time of his departure, and, therefore, the denial of his motion for summary judgment represents a holding that the tolling statute always applies to a nonresident defendant despite amenability to substituted service.

However, long-arm jurisdiction was not available against individual defendants until January 1964. R.R. 4:4-4(j) (effective Jan. 2, 1964) (current version at R. 4:4-4(e). Assuming that the limitations period would ordinarily run during periods of absence when subject to substituted service, the statute ran against Matthews for two months in 1963 and then re-commenced to run in January 1964. By that calculation, the complaint was filed only some seven months into the limitations period, and the action was timely without the aid of the tolling statute. Thus, the disposition of Matthews' summary judgment motion does not reflect on the relationship between the tolling statute and substituted service.

process could constitutionally extend beyond the territorial boundaries of a state, *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945), long-arm service was not adopted in New Jersey until 1958.[13] Further, the New Jersey courts have tended to construe the tolling statute narrowly so as not to incorporate subsequent broadening of the service laws. *See*, n. 11, *supra*. One court has held in the context of an individual defendant that amenability to long-arm service does not satisfy the tolling statute. *Fidelity Deposit Co. of Maryland* v. *Abagnale*, *supra* at 144. For these reasons, the foreign corporation section of the tolling statute cannot be construed to encompass extra-territorial service unknown to the legislature at the time of enactment and not within the intendment and scope of the statutory language.[14]

Finally, Searle argues that if the New Jersey tolling statute acts to deny the statute of limitations to a foreign corporation subject to long-arm jurisdiction, that statute violates the equal protection clause of the United States Constitution.[14a] This, too, is an issue of first impression.

---

[13] Long-arm service over corporations was adopted in 1958. R.R. 4:4-4(d) (effective Sept. 3, 1958). It was extended to individuals in 1964. R.R. 4:4-4(j) (effective Jan. 2, 1964).

[14] Searle has relied on cases construing the Ohio and Idaho tolling statutes to be inapplicable to foreign corporations subject to long-arm jurisdiction. *Partis* v. *Miller Equipment Co.*, 324 F. Supp. 898 (N.D. Ohio 1970); *Lipe* v. *Javelin Tire Co., Inc.*, 96 Idaho 723, 536 P.2d 291 (1975). The tolling statutes in those states provide for tolling when a person is "absent from the state." Such general language lends itself to a broader interpretation than the more restrictive wording of the New Jersey statute.

[14a] Searle also makes a due process argument. Because of my holding of the equal protection question, I need not reach Searle's due process claim.

First Opinion of the United States District Court for the District of New Jersey, Filed March 22, 1978

Searle's position is that a statutory classification must bear a rational relationship to the purpose of the enactment to withstand an equal protection challenge. Where an out-of-state defendant is amenable to process, Searle argues that the purpose of the tolling statute is satisfied, and there is no reason to deny such a defendant the statute of limitations. While conceding that Searle is correct as to the equal protection standard, plaintiffs reply that the classification here under attack is rational because one of the purposes of the tolling statute is to penalize foreign unlicensed corporations by denying them repose to encourage domestication.[15]

---

[15] Plaintiffs' position that the tolling statute was intended as a penalty to induce licensure is flawed. N.J.S.A. 14A:13-3(1) (1969) provides that a foreign corporation has no right to transact business within New Jersey without obtaining a certificate of authority from the Secretary of State. Where corporate activities do not meet the standard of "transacting business," registration is not required. *See* N.J.S.A. 14A:13-3(2); N.J.S.A. 14A:13-11 (1969); *Materials Research Corp.* v. *Metron*, 64 N.J. 74 (1973); *United States Time Corp.* v. *Grand Union Co.*, 64 N.J.Super. 39 (Ch. Div. 1960). Assuming, *arguendo*, that the tolling statute was intended to impose a penalty on unlicensed foreign corporations, such a penalty would fall with equal weight on all foreign corporate defendants without representation by persons or officers, irrespective of the nature of their New Jersey activities. Because the standard of state contacts sufficient for long-arm jurisdiction is substantially lower than that for "transacting business," *Materials Research Corp.* v. *Metron*, *supra* at 84, the sanction of the tolling statute would be imposed on corporations which would not be required to register under N.J.S.A. 14A:13-3. While there may be some justification for denying the statute of limitations to corporations transacting business without registration, the toll-

(Footnote continued on following page)

First Opinion of the United States District Court for the District of New Jersey, Filed March 22, 1978

The thrust of the equal protection clause is the proscription of arbitrary discrimination between persons similarly situated. *Schmidt* v. *Board of Adjustment of City of Newark*, 9 N.J. 405 (1952). As more fully stated by the Supreme Court,

> the Fourteenth Amendment does not deny to the States the power to treat different classes of persons in different ways. *Barbier* v. *Connolly*, 113 U.S. 27 (1885); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Railway Express Agency* v. *New York*, 336 U.S. 106 (1949); *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstances shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412 (1920).

(Footnote continued from preceding page)

ing statute would reach a far greater class of corporate defendants and, as construed by plaintiffs, that statute would itself effect an irrational classification. Further, since state licensure may not be required of a foreign corporation which is involved in the state solely in interstate commerce, *Eli Lilly & Co.* v. *Sav-On Drugs, Inc.*, 366 U.S. 276, 278 & n. 7 (1961), plaintiffs' reading of the tolling statute would run afoul of the commerce clause. I am aware of no provision imposing penalties for transacting business without a license other than N.J.S.A. 14A:13-11.

Reed v. *Reed*, 404 U.S. 71, 75-76 (1971). *Accord, N.J. Restaurant Association* v. *Holderman*, 24 N.J. 295 (1957).

As indicated, the purpose of the tolling statute is to preserve a plaintiff's cause of action where service cannot be effected upon the defendant on account of non-amenability to process. *Lemke* v. *Bailey, supra* (Schettino, J., dissenting); *Ferraro* v. *Ferro Trucking Co., supra.* Nothing in the legislative history or court construction of N.J.S.A. 2A:14-22 supports plaintiffs' assertion that a purpose of the statute is to penalize foreign unlicensed corporations to encourage licensure.[16]

The effect of the foreign corporation section of the tolling statute is to distinguish between domestic and foreign corporations subject to service through representative agents within the state and foreign corporations subject to service under the long-arm rule. The former are entitled to plead the statute of limitations while the latter are denied its repose. Since this difference in treatment bears no rational relationship to the object of the tolling statute, I find that the statute denies equal protection to foreign corporations amenable to long-arm jurisdiction.[17] *Cf.*

---

[16] While the sponsor's statement regarding the 1949 amendment indicated that the legislature intended to give the benefit of the statute of limitations to foreign licensed corporations, the language of the amendment is not so narrowly phrased as to deny unlicensed corporations a statute of limitations defense.

[17] While this holding is limited to corporate defendants, individuals are subject to long-arm jurisdiction in New Jersey, R. 4:4-4(e), and I agree with plaintiffs that "[t]here is no logical

(Footnote continued on following page)

Lemke v. *Bailey, supra* at 305-06 (Schettino, J., dissenting).

One who by law is subject to a state's jurisdiction is effectively present and represented within that state. Hurwitch v. Adams, 151 A.2d 286 (Del. Super. Ct.), *aff'd*, 52 Del. 247, 155 A.2d 591 (1959); *Bolduc* v. *Richards*, 101 N.H. 303, 142 A.2d 156 (1958); *Snyder* v. *Clune*, 15 Utah 2d 254, 390 P.2d 915 (1964). Where the long-arm rule places an out-of-state defendant on an equal footing with a resident or represented one, there is no rational justification for differential treatment of such defendants with regard to the statute of limitations. While the tolling stat-

---

(Footnote continued from preceding page)

reason to treat corporate and individual defendants in a different manner." *Lackovic* v. *New England Paper Tube Co., Inc., supra* at 398. One court has held that it does not deny equal protection of the laws to apply a tolling statute to an individual defendant subject to substituted service pursuant to a nonresident motorist statute because of the latter statute's requirement of actual notice to the defendant for a personal judgment and the difficulty of locating an individual in another state. *Vaughn* v. *Deitz*, 430 S.W.2d 487 (Tex. 1968). However, the burdens on plaintiffs found so onerous by that court are minimized in New Jersey practice. In New Jersey, an action is commenced by filing a complaint with the court, R. 4:2-2, and a summons is to be issued and served 10 days thereafter. R. 4:4-1. However, liberal relief is granted from the 10-day service rule where the plaintiff uses due diligence to find the defendant. *See Cooke* v. *Yarrington*, 62 N.J. 123 (1973); *X-L Liquors, Inc.* v. *Taylor*, 17 N.J. 444, 454 (1955). Thus, there is no prejudice to plaintiffs in requiring them to file a complaint within the limitations period where their cause of action will be preserved so long as they make reasonable efforts to find the defendant.

ute made eminent good sense in the days of territorial restrictions on service, it has become dated in the instant context by modern changes in the law of in personam jurisdiction. The infirmity which the statute has developed in the course of the aging process is over-permissiveness: until today it allowed a plaintiff to postpone indefinitely the assertion of his cause of action even though the defendant was subject to service. As a matter of fair judicial administration, where a defendant may be brought before the courts, he should be permitted to assert the statute of limitations to implement the important policies behind that statute to spare defendants from being put to a defense after evidence is lost, memories have faded and witnesses have died or disappeared and to deliver the courts from the litigation of stale and possibly fraudulent claims. *Union City Housing Authority* v. *Commonwealth Trust Co.*, 25 N.J. 330, 335 (1957). The instant holding brings New Jersey law[18] into conformity with the rule in the majority of the states[19] that amenability to process by

---

[18] I express no view on the rule of *Lemke* v. *Bailey*, *supra*, but note that any defendant subject to service under New Jersey nonresident motorist statute, N.J.S.A. 39:7-2, is also amenable to long-arm jurisdiction.

[19] Of the 42 states which have considered the question, 38 take the majority position. *See* 94 A.L.R. 485 (1935); 119 A.L.R. 859 (1939); 17 A.L.R.2d 502 (1951); 55 A.L.R.3d 1158 (1974).

Contra:

New Jersey:

Lemke v. *Bailey*, 41 N.J. 259, 196 A.2d 523 (1963).

(Footnote continued on following page)

substituted or long-arm service renders the tolling statute inapplicable.

In light of the above result, it will become necessary to resolve the second issue tendered by the motion of defendant for summary judgment—whether plaintiffs are entitled to the benefit of the "discovery" rule in bar of the statute of limitations. There will be no necessity to enter an order on the motion until that question is resolved.

Datd: March 22, 1978.

(Footnote continued from preceding page)

Ohio:

Couts v. *Rose*, 152 Ohio St. 458, 90 N.E.2d 139 (1950). However, the Ohio courts have taken a different approach to corporations. *See Partis* v. *Miller Equipment Co.*, 324 F.Supp. 898 (N.D. Ohio 1970), *aff'd*, 439 F.2d 262 (6th Cir. 1971).

S. Carolina:

Macri v. *Flaherty*, 115 F.Supp. 739 (E.D.S.C. 1953).

Texas:

Dietz v. *Vaughn*, 423 S.W.2d 113 (Civ. App. 1967), *aff'd*, 430 S.W.2d 487 (Tex. 1968).

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Action No. 74-450

SUSAN COHN and WALTER COHN, her husband,
Plaintiffs,

v.

G. D. SEARLE & COMPANY,
Defendant.

Appearances:

Walter R. Cohn, Esq.
Attorney for Plaintiffs.

Shanley & Fisher, Esqs.
Attorneys for Defendant.
By: Raymond M. Tierney, Jr., Esq.

MEANOR, District Judge.

This matter comes before the court on defendant's motion for summary judgment to dismiss the complaint. Plaintiffs, Susan Cohn and Walter Cohn, her husband and attorney, initiated suit against G. D. Searle & Com-

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

pnay ("Searle"), the manufacturer of the oral contraceptive Enovid, for personal injury and *per quod* damages allegdly resulting from Mrs. Cohn's use of the drug. Mrs. Cohn commenced taking the contraceptive in the spring of 1963 and continued its use until December 22, 1963. On that date, she suffered a stroke, or cerebral vascular accident ("C.V.A."), when a blood clot lodged in the circulatory system of her brain. The C.V.A. required surgery, long hospitalization and rehabilitative therapy and resulted in permanent physical injury.

It appears that in 1964 little or nothing was known about potential coagulant side effects of oral contraceptives. However, from at least 1966 the medical literature and the lay press increasingly reported research which suggested a relationship between oral contraceptives and abnormal blood clotting. Sometime between 1966 and late 1973 the Cohns became aware of the possible link between Mrs. Cohn's C.V.A. and the ingestion of Enovid. Tr. at 58; plaintiffs' [first] brief marked in evidence Exhibit D-9 at 4-5. They initiated suit against Searle on January 29, 1974. Their complaint, predicated on theories of negligence, breach of warranty, statutory violations and strict liability, was filed in the Superior Court of New Jersey, Law Division, Essex County. Service was effected on Searle under the long-arm rule. Rule 4:4-4. On April 1, 1974, the case was removed to this court pursuant to 28 U.S.C. § 1441. Jurisdiction is invoked pursuant to 28 U.S.C. § 1332 and venue is proper under 28 U.S.C. § 1391(a).

At all times relevant to this action, the plaintiffs have been residents of New Jersey. Searle is a Delaware corporation with its principal place of business in Illinois.

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

Prior to December 30, 1960, Searle was registered to do business in New Jersey, but on that date it formally withdrew from the state.

Searle first moved for summary judgment on grounds that plaintiffs' cause of action is time-barred under the relevant two-year statute of limitations, N.J.S.A. 2A:14-2 (1952).[1] On March 22, 1978, this court in a written opinion held, *inter alia,* that a foreign corporation's amenability to process by substituted or long-arm service renders the New Jersey tolling statute, N.J.S.A. 2A:14-22, inapplicable. Where a defendant could be brought before the New Jersey courts, this court reasoned, he should be permitted to assert the statute of limitations to implement the important policies behind that statute. *Cohn* v. *G. D. Searle & Co.,* 447 F. Supp. 903, 912-13 (D.N.J. 1978). In light of the result reached, this court noted that it became necessary to resolve the issue whether plaintiffs were entitled to the benefit of the "discovery" rule. *Fernandi* v. *Strully,* 35 N.J. 434, 173 A.2d 277 (1961); *Lopez* v. *Swyer,* 62 N.J. 267, 300 A.2d 563 (1973). Testimony was heard February 12, 1979 on that issue.

Plaintiffs now allege that it was not possible for them to bring suit until 1974 on account of two factors: (1) it was not until 1969-1970 that the medical evidence linking the ingestion of Enovid and the C.V.A. came to light;

---

[1] 2A:14-2. 2 years; actions for injuries to person by wrongful act.

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

and (2) Mrs. Cohn was experiencing a severe depression, attributable to her injury, which delayed commencement of suit until 1974.

Plaintiffs argue that the two-year statute of limitations in a medical malpractice action, N.J.S.A. 2A:14-2, begins to run not when the negligence occurred, but when the injured party knew or reasonably should have known of the injury as well as of the basis for an actionable claim. *Lopez, supra; Goodman* v. *Mead Johnson & Co.*, 434 F.2d 566 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977) (Gibbons, J.). Where one suffers a temporary disability, such as insanity, the statute is tolled for the period of the disability. N.J.S.A. 2A:14-21; *Kyle* v. *Green Acres at Verona, Inc.*, 44 N.J. 100, 207 A.2d 513 (1965). Since Mrs. Cohn's depression is a comparable disability to insanity, plaintiffs contend that the period of her disability, 1970-1973, Tr. at 58-60, tolls the statute. When the above disability subsided, plaintiffs promptly filed suit in 1974 because at that point Mrs. Cohn was fully cognizable of the basis for her claim.

Searle responds that prior to the February 12, 1979 hearing plaintiffs articulated that the delay in filing was due solely to the lack of concrete evidence linking the taking of the Enovid to Mrs. Cohn's C.V.A. Moreover, depression, defendant argues, does not fall within the meaning of disability as defined in N.J.S.A. 2A:14-21, nor was Mrs. Cohn insane as that term was defined in *Kyle, supra.*

Thus, the questions before this court are whether the lack of concrete medical evidence linking Enovid and the C.V.A. entitles plaintiffs to the benefit of the discovery

rule and, if so, whether the alleged temporary insanity of Mrs. Cohn tolls the running of N.J.S.A. 2A:14-2.

The New Jersey Supreme Court first announced the discovery rule in *Fernandi* v. *Strully, supra,* wherein the Court held that the two-year statute of limitations in a medical malpractice action began to run not when the negligence in fact occurred, but, rather, when the injured party knew or had reason to know of the presence of negligently left foreign objects in the body.[2] The rule

---

[2] Early cases in New Jersey held that the two-year statute of limitations for personal injuries, N.J.S.A. 2A:14-2, in the context of medical malpractice litigation begins to run at the moment of the negligent act, irrespective of the time when the injury is discovered. While it was recognized that individual hardships would result, the courts contended that to hold otherwise "'would be inimical to the repose of society and promote litigation . . . too uncertain and too speculative to be encouraged.'" *Tortorello* v. *Reinfeld,* 6 N.J. 58, 67, 77 A.2d 240, 244 (1950); *Weinstein* v. *Blanchard,* 109 N.J.L. 332, 162 A. 601 (Ct. Err. & App. 1932).

However, in order to circumvent the strict application of the statute of limitations in this context, courts in various jurisdictions created artificial approaches such as the doctrine of continuous treatment, fraudulent concealment of injury, constructive fraud in the physician's silence, and the concept of continuing negligence. W. Prosser Handbook of the Law of Torts § 30 at 144 (4th ed. 1971). The *Fernandi* Court adopted the most direct approach, *i.e.,* the discovery rule, in response to the equitable consideration that an individual should not be denied his day in court due to blameless ignorance.

evolved beyond foreign body malpractice actions[3] to the point where the statute did not run until the plaintiff learned or reasonably should have learned of the injury and the basis for an actionable claim. *Lopez, supra,* 62 N.J. at 272; *Burd* v. *New Jersey Telephone Company,* 76 N.J. 284, 291-92 (1978).[4] The plaintiff, who contends that his discovery of a cause of action postdated defendant's actionable conduct, has the burden of proof as to the date of such discovery. *Lopez, supra,* 62 N.J. at 276; *Fox* v. *Passaic General Hospital,* 71 N.J. 122, 128 n. 1, 363 A.2d

---

[3] *See, e.g., Moran* v. *Napolitano,* 71 N.J. 133, 363 A.2d 346 (1976) (discovery rule applicable to alleged misdiagnosis); *Yerzy* v. *Levine,* 57 N.J. 234, 271 A.2d 425 (1970) (discovery rule applicable to negligent performance of internal surgery where no foreign object was involved); *Diamond* v. *New Jersey Bell Tel. Co.,* 51 N.J. 594, 596-97, 242 A.2d 622, 623 (1968) (discovery rule applicable to negligent installation of conduit); *New Mkt. Poultry Farms, Inc.* v. *Fellows,* 51 N.J. 419, 420, 425, 241 A.2d 633, 636-37 (1968) (discovery rule applicable to negligently prepared survey); *Rosenau* v. *City of New Brunswick,* 51 N.J. 130, 134, 139-40, 238 A.2d 169, 171, 173-74 (1968) (discovery rule applicable to defect in water meter).

[4] In defining the discovery rule, the *Lopez* Court considered knowledge of the "basis for an actionable claim" to be a prerequisite to the running of the statute of limitations. *Id.* at 272; Burd, *supra,* 76 N.J. at 291. Because the discovery rule is defined in this manner, knowledge of the injury must necessarily be coupled with knowledge of the causal relationship between the injury and some negligent act of the defendant in order for the statute of limitations to commence running.

341, 344 n. 1 (1976).[5] Once such discovery has been established, application of the discovery rule is automatically effective, provided suit is promptly filed within two years thereafter and absent a showing of undue prejudice by defendant. *Fox, supra,* 71 N.J. at 127-28.[6]

---

[5] Generally, the time of discovery in federal court is a fact question for the jury not the judge. *Goodman* v. *Mead Johnson & Co., supra.* This rule takes precedence over the state rule set forth in *Lopez* which allows the judge to make such determination. *Id.* at 573. Here, the parties expressly agreed to have the judge decide this question. Tierney Letter dated Sept. 27, 1977; Cohn Letter dated Oct. 4, 1977.

[6] The *Fox* Court held that a plaintiff who discovers the existence of a malpractice cause of action prior to the expiration of a period of two years after defendant's actionable conduct has a full two years after such discovery to bring the action absent a showing of prejudice by defendant and the lapse of a reasonable length of time within which to initiate suit. The *Fox* decision therefore mandates that the defendant be charged with a two-part showing of prejudice in order to preclude application of the discovery rule. Such ruling is a departure from *Lopez* which placed the burden of proof on the party claiming belated discovery of a cause of action. Under *Lopez,* several factors were to be considered before applying the rule: the nature of the injury, the availability of witnesses and evidence, the length of time which had elapsed, whether the delay was intentional, and the prejudice to defendant. *Id.* at 276.

The prejudice rule in *Fox,* however, may only be applicable in cases where plaintiff discovers his cause of action within two years of the alleged injury. The Court specifically reserved decision on the effect of prejudice to defendant where the cause of action is discovered later. *Id.* at 128, n. 1.

(Footnote continued on following page)

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

A review of the facts here clearly demonstrates that plaintiffs are entitled to the benefits of the discovery rule. Mrs. Cohn's C.V.A. occurred in 1963 at a time when she was otherwise in perfect health. The seriousness of her subsequent injuries could not have been attributed to Enovid without concrete medical evidence.

In this regard, Mrs. Cohn was asked:

> Q. When, Mrs. Cohn did you first make any connection between your C.V.A. and Enovid?
>
> A. I'm not exactly sure, but I think it was probably the period when my older daughter was in high school.
>
> Q. Your older daughter being Nancy?
>
> A. Yes. I think it must of been that four year period along in there.
>
> Q. Could you be more specific about that?
>
> A. In fact, I'll take a pencil and paper and work backwards. That would be 1970 less four, which brings us back to 1966, so I guess it would be somewhere along in between.
>
> Q. Nancy is graduating from college this year?
>
> A. Yes.

(Footnote continued from preceding page)

In either case, evaluation of the prejudice rule requires an analysis of the *Lopez* criteria as well as plaintiff's alacrity in filing suit. Moreover, the discovery doctrine itself is subject to some restraint. As the time from the occurrence of the malpractice increases considerations of fairness to the defendant become more insistent. *Owens* v. *White*, 342 F.2d 817, 820 (9th Cir. 1965) (relied upon by *Fox* Court).

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

Q. So she would of [sic, have] graduated from high school in 1970? Isn't that so?

A. Yes.

Q. So she would have been in high school between—

A. I could see my problem. I subtracted four years for high school instead of three, which would make it 1967.

Q. *Well, she would of [sic, have] been in high [school] from 1966 thru 1970? Isn't that so?*

A. *Yes.*

Q. *Was it during that period of time that you first made a connection?*

A. *There seemed to be something coming out in the papers and in the news magazines.*

Q. *At that time?*

A. *Yes.*

Q. *Is that when you first made the connection?*

A. *That's right.*

Susan Cohn Deposition, filed July 15, 1975, pp. 6-8 (Emphasis added).

Whereas her husband-attorney testified as follows:

Mr. Cohn: The first question raised to the Court this morning is when I knew of the causal connection and the possibility of a lawsuit against the defendant. I testified in depositions that in the late, latter part of 1969, the beginning of 1970, there was literature coming out among—in the press as to the possible causal connection between the ingestion of Enovid, or the birth control as such, and stroke. And I did begin collecting literature at that time. But I did not start a lawsuit until 1974.

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

> As an explanation to the Court, there is no question that I did consider the lawsuit in 1970, when the literature began coming out. I discussed it with Mia, M-i-a, Parsonnette, the wife of Doctor Victor Parsonette, she being a doctor as well. I testified in depositions that I knew her from community work.
>
> She had spoken to me about it. She had suggested the possible causal connection, although she didn't encourage a lawsuit, but I then, knowing that she had some knowledge about it, had discussed it with her.
>
> Her husband performed the operation upon my wife the very first night after the stroke. I knew him, I knew her. And I was aware of the possibility of a lawsuit.

Tr. at 58.

Such concrete medical evidence did not in fact come to light until 1970 wherein the FDA finally, after extensive research, took the position that "[the] use of the oral contraceptives increases the risk of thromboembolic disorders . . . [although] data [is] inadequate to delineate differences between specific products . . . ." Defendant's Exhibit D-13; *see* Defendant's Exhibits D-14, D-15, D-16, D-17, D-18.

To link the occurrence of a C.V.A. and the ingestion of Enovid would go beyond what a reasonable man should have known in 1964. The scientific community itself was uncertain about such a link. In 1966, the FDA concluded that "[t]he most recent work on the response of blood coagulation factors to oral contraceptives indicated no statistically significant effect." Defendant's Exhibit D-17.

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

Accordingly, this Court finds that the applicable date of discovery for the purposes of N.J.S.A. 2A:14-2 was in early 1970.[7]

Searle has not demonstrated any prejudice or that the delay was intentional. In light of the injuries suffered and the clear availability of witnesses and evidence, this Court, in accordance with *Lopez* and *Burd*, finds that plaintiffs

---

[7] We are not faced with a fact situation analogous to *Burd, supra*. There, the claimant suffered a heart attack while working in a trench gluing together plastic pipe. He had used the glue for one week prior to the attack and had experienced dizziness in so doing. In addition, he had read the label warning him not to inhale fumes. The Court barred the action for failure to commence suit within two years of the heart attack, notwithstanding the fact it was not until one year thereafter that plaintiff was advised by counsel of a possible products liability claim. In pertinent part, Judge Conford (sitting by designation) emphasized that a cause of action is not "postponed until plaintiff learns or should learn the state of the law positing a right of recovery upon the facts already known to or reasonably known by the person." *Id.* at 292.

Here, Searle had put no one on notice of potential coagulant side effects or oral contraceptives. The FDA reports were inconclusive. Defendant's Exhibit D-17. Medical evidence did not surface until the late 1960s. Defendant's Exhibits D-13, D-14, D-15, D-16, D-17, D-18. Mrs. Cohn did not have knowledge of an actionable claim in 1963 against Searle for negligent testing or compounding or for failure to warn of known hazards. Accordingly, linking the ingestion of Enovid to the C.V.A. went beyond the knowledge of a reasonable man and possibly even the medical community.

are entitled to the benefits of the discovery rule.[8] The pertinent statute of limitations, N.J.S.A. 2A:14-2, therefore, did not begin to run until 1970.

The issue now becomes whether or not plaintiffs' suit should be barred for failure to bring the instant suit within two years of the date of discovery.

Plaintiffs allege that on or about the date of discovery Mrs. Cohn was suffering from a severe depression sufficient to constitute a disability under N.J.S.A. 2A:14-21, thereby tolling the statute of limitations.[9]

---

[8] *See generally Kubrick* v. *United States*, 581 F.2d 1092, 1095-96 (3d Cir. 1978); *Exnicious* v. *United States*, 563 F.2d 418, 420 (10th Cir. 1977); *Raymond* v. *Eli Lilly & Co.*, 412 F. Supp. 1392, *aff'd*, 556 F.2d 628, 629-30 (1st Cir. 1977); *Bridgford* v. *United States*, 550 F.2d 978, 981 (4th Cir. 1977); *Reilly* v. *United States*, 513 F.2d 147, 150 (8th Cir. 1975); *Jordan* v. *United States*, 503 F.2d 620, 262 (6th Cir. 1974); *Tyminski* v. *United States*, 481 F.2d 257, 263 (3d Cir. 1973); *Toal* v. *United States*, 438 F.2d 222, 224-25 (2d Cir. 1971); *Ashley* v. *United States*, 413 F.2d 490, 492 (9th Cir. 1969); *Quinton* v. *United States*, 304 F.2d 234, 240 (5th Cir. 1962).

[9] It should be pointed out that this allegation is one of recent vintage. Prior to the hearing of Feb. 12, 1979, plaintiffs articulated to this Court that the sole reason for the lateness in filing the complaint was the result of lack of "concrete evidence linking the taking of 'Enovid' to Susan Cohn's C.V.A." Plaintiffs' [first] Brief marked in evidence Exhibit D-9, pp. 4-5.

Plaintiffs are, as of Feb. 12, 1979, arguing for the first time that Mrs. Cohn's depression (disability) prevented Mr. Cohn from discussing the lawsuit with his wife until 1974 when suit was filed.

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

N.J.S.A. 2A:14-21 provides:

> If any person entitled to any of the actions or proceedings specified in sections 2A:14-1 to 2A:14-8 or sections 2A:14-16 to 2A:14-20 of this title or to a right or title of entry under section 2A:14-6 of this title is or shall be, at the time of any such cause of action or right or title accruing, under the age of 21 years, or insane, such person may commence such action or make such entry, within such time as limited by said sections, after his coming to or being of full age or of sane mind.

The statute explicitly provides for only two disabilities, infancy and incompetency. Although there are few cases which construe the toll for insanity, *Kyle, supra; Sobin* v. *M. Frisch & Sons,* 108 N.J.Super. 99, 260 A.2d 228 (App. Div. 1969), *certif. denied,* 55 N.J. 448, 262 A.2d 702 (1970), the determination of insanity requires an evaluation of all the relevant facts and circumstances, keeping in mind the manifest purpose of the tolling provision to "relieve from strict time restrictions any person who actually lacks the ability and capacity, due to mental affliction, to pursue his lawful rights." *Sobin, supra,* 108 N.J. Super. at 104.

The word insane in this statute "means such a condition of mental derangement as actually prevents the sufferer from understanding his legal rights or instituting legal action." *Kyle, supra,* 44 N.J. at 113. Such definition was broadened in *Sobin* to cover a party rendered unconscious

for a period of 100 days.[10] The above language indicates that the determination of disability should be a pragmatic one, not necessarily based upon medical or psychological classifications alone; *i.e.*, plaintiff's experts. *See Graboi* v. *Kibel*, 432 F.Supp. 572 (S.D.N.Y. 1977).

At the Feb. 12, 1979 hearing, plaintiffs put the reports of Dr. Liss, Dr. Nudelman, and Dr. Shuttleworth into evidence. All three doctors came to the similar conclusion that due to Mrs. Cohn's severe emotional depression and reaction to her physical handicap she was unable, except at a tremendous risk, to discuss her legal initiatives from 1971 to 1973. Plaintiffs' Exhibits P-3, P-4, P-6. In particular, Dr. Shuttleworth, her psychiatrist during this period, described her condition as follows:

> Finally, however, the patient [Mrs. Cohn] herself, by the end of 1971, approaching the anniversary time of the stroke, and because of the internal pressure of the depression and suicidal ideation, sought psychiatric help. After the initial session, the pa-

---

[10] It is generally recognized in other jurisdictions that a person may be under the legal disability of insanity within the meaning of the exception to the statute of limitations when the disability is of such a nature as to show him unable to manage his business affairs or estate, or to comprehend his legal rights or liabilities. *See, e.g., Hurd* v. *County of Allegheny*, 39 A.D.2d 499, 502-03, 336 N.Y.S.2d 952, 956 (4th Dept. 1972); *Spearman* v. *Jones*, 226 Ga. 27, 172 S.E.2d 602 (Sup. Ct. 1970); *Klamm Shell* v. *Berg*, 165 Colo. 540, 441 P.2d 10 (Sup. Ct. 1968); *Hsu* v. *Mt. Zion Hospital*, 259 Cal. App.2d 562, 66 Cal. Rptr. 659 (Dist. Ct. App. 1968); *Emery* v. *Chesapeake & O. Ry.*, 372 Mich. 663, 127 N.W.2d 826 (Sup.Ct. 1964); *Roberts* v. *Stith*, 383 P.2d 14 (Sup. Ct. Okla. 1963); *Pearl* v. *Pearl*, 177 Cal. 303, 177 P. 845 (Sup. Ct. 1918).

> tient succumbed to her negative thinking and was hospitalized in December, 1971, because of a suicidal gesture, an overdosage with sedatives. During this hospitalization, antidepressant medication was started, and after discharge in January, 1972, active psychotherapy began.
>
> Response to treatment was sufficiently positive by 1973 so that discussion of legal action was at least possible without evasion. This timing was brought about by the psychological development of newly positive general attitudes, a more acceptant and realistic self-image, improved interpersonal skills, and an alternative life style which included new activities and teaching opportunities.
>
> In conclusion, it is my opinion that during the eight years, 1965 through 1973, pressing the issue of legal action, with its concomitant forcing of awareness and premature elimination of Mrs. Cohn's protective denial could, in view of what actually did occur in 1971, have produced a suicidal crisis with the unpredictable risk of a completed suicide.

Plaintiffs' Exhibit P-6.

In view of such medical analysis, plaintiffs assert that Mrs. Cohn's depression rises to the level of insanity set forth in *Kyle*. In addition, plaintiffs rely on *Giles* v. *Gassert*, 23 N.J. 22, 127 A.2d 161 (1956); *Giacobbe* v. *Gassert*, 29 N.J. 421, 149 A.2d 214 (1959); *Greene* v. *Director of the Division of Motor Vehicles*, 65 N.J. Super. 242, 167 A.2d 642 (App. Div.), *certif. denied*, 35 N.J. 60, 171 A.2d 146 (1961) and *White* v. *Violent Crimes Compensation Board*, 76 N.J. 368, 388 A.2d 206 (1978) for the proposition that Mrs. Cohn's disability should toll the statute.

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

Plaintiffs' arguments are unpersuasive. *First*, the cases cited by plaintiffs do not deal with N.J.S.A. 2A:14-21. *Giles*, *Giacobbe*, and *Greene* were brought under the Unsatified Claim and Judgment Fund Law, N.J.S.A. 39:6-65,[11] which specifically provides for tolling of its notice claim rule in the event the would-be claimant is "physically incapable" of giving the required notice. The claimants in each of the three cases had the requisite "physical incapacity" to give notice and, thus, the notice requirements were accordingly tolled.

---

[11] N.J.S.A. 39:6-65 provides in pertinent part:

> Any qualified person, or the personal representative of such person, who suffers damages resulting from bodily injury or death or damage to property arising out of the ownership, maintenance or use of a motor vehicle in this State on or after April 1, 1955, and whose damages may be satisfied in whole or in part from the fund, shall, except in cases in which the claim is asserted by actions brought under section 18 of this act pursuant to section 19 of this act, within 90 days after the accident, as a condition precedent to the right thereafter to apply for payment from the fund, give notice to the board, the form and contents of which shall be prescribed by the board, of his intention to make a claim thereon for such damages if otherwise uncollectable; provided, any such qualified person may, in lieu of giving said notice within said time, make proof to the court on the hearing of the application for the payment of a judgment (a) that he was physically incapable of giving said notice within said period and that he gave said notice within 90 days after he became physically capable to do so or in the event he did not become so capable, that a notice was given on his behalf within a reasonable period. . . .

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

White involved a claim by a violent crime victim for compensation under the Criminal Injuries Compensation Act, N.J.S.A. 52:4B-1 *et seq.*, which provides that application for compensation be made within one year of the injury or death.[12] Application was in fact made beyond the one year period and rejected by the Violent Crimes Compensation Board as being out of time. In an unpublished opinion, the Appellate Division affirmed and the Supreme Court reversed.

Because of the factual circumstances concerning the crime, the injuries suffered, and "[plaintiff's] diligent pursuit of assistance," *id.* at 371, the majority, speaking through Justice Pashman, felt compelled to discard the traditional distinctions between "procedural" and "substantive" statutes of limitation and held that: "in the case of a statutorily created right, a 'substantive' limitation period may appropriately be tolled *in a particular set of circumstances if the legislative purpose underlying the statutory scheme will thereby be effectuated.*" *Id.* at 379 (emphasis added). In essence, the Court held, *inter alia*, that in appropriate circumstances, equitable considerations may affect the tolling of "substantive" statutes of limitation so long as the legislative purpose will be advanced. That has long been the rule with "procedural" statutes of limita-

---

[12] In particular, N.J.S.A. 52:4B-18 provides in part:

> No order for the payment of compensation shall be made under section 10 of this act unless the application has been made within 1 year after the date of the personal injury or death, and the personal injury or death was the result of an offense listed in section 11 of this act which had been reported to the police within 3 months after its occurrence.

tion, such as N.J.S.A. 2A:14-2, involved here. It is important to note that the *White* Court stressed the purpose of the legislation—compensation to crime victims and did not perceive any legislative policy precluding a tolling because of crime-induced incapacity. *Cf. id.* at 390-91 (Conford, J., dissenting).

Thus, while *Giles*, *Giacobbe*, and *Greene* broaden the definition of physical incapacity under N.J.S.A. 39:6-65 and *White* creates an equitable exception to N.J.S.A. 52:4B-18, such cases do not advance the position taken by plaintiffs.[13]

Secondly, this Court finds that Mrs. Cohn's alleged depression does not constitute a disability under N.J.S.A. 2A:14-21 so as to toll N.J.S.A. 2A:14-2.

The mental state of a person is not something capable of precise measurement. Variations in emotional outlook are common in all people. The percentage of the population that suffers from a sufficient degree of mental or emotional disturbance to require medical treatment is substantial and would probably be greater were not psychiatric treatment so expensive. Most, however, are capable of managing their own personal affairs with a reasonable degree of success. *Graboi, supra*, 432 F.Supp. at 579.

---

[13] Plaintiffs set forth additional cases which likewise are not particularly helpful to their tolling arguments. *Squires* v. *Rush*, 408 F.2d 372 (3d Cir. 1969) (per curiam) (plaintiff's alleged mental disorder did not rise to insanity under N.J.S.A. 2A:14-21 as the court specifically noted that plaintiff was neither hospitalized nor adjudicated insane). *Raymond* v. *Eli Lilly & Co.*, *supra* (discovery rule should not be rigidly limited).

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

The doctors who examined and/or treated Mrs. Cohn over the past years, in particular Dr. Liss, Dr. Nudelman, and Dr. Shuttleworth, all concluded that Mrs. Cohn was so severely depressed that she was unable to institute legal proceedings until 1974.

The reports of Dr. Liss and Dr. Nudelman reveal that it was not until late 1972 or early 1973 that Mrs. Cohn could discuss her legal alternatives. Plaintiffs' Exhibits P-3, P-4. The last two reports of Dr. Shuttleworth indicate that the pressing of legal action from the years 1965 to 1973 could have produced unpredictable risks. Plaintiffs' Exhibits P-6, P-7. Such medical analysis would apparently bring Mrs. Cohn's depression within the meaning of "insanity" as defined in *Kyle*.

However, from the evidence before me, these doctors never came to such conclusions until late 1978 or 1979, long after the commencement of the instant action. For instance, the first report of Dr. Shuttleworth dated June 19, 1974 makes no mention of the severity of the depression nor whether it interfered with the patient's understanding of her legal status. Defendant's Exhibit D-6. The second and third Shuttleworth reports, which contained such conclusions, were issued subsequent to a letter from Mr. Cohn dated Sept. 12, 1978 informing Dr. Shuttleworth of the pending action and of his pertinent legal theories. *See* Tr. at 22.

At the hearing, Mr. Cohn was asked:

> Q. Up until that letter [Cohn Letter to Dr. Shuttleworth, Sept. 12, 1978] had you ever even discussed the subject of Susan's, Mrs. Cohn's emotional and psychological state as having any bearing on a lawsuit at all?

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

A. You're talking about Doctor Shuttleworth?
Q. Yes, sir.
A. My best recollection is no.

• • •

Q. I'm not talking about the case. I know you've spoke to Doctor Liss about the case and I assume you've spoken to Doctor Nudelman. The specific question, Mr. Cohn is, had you ever talked to Doctor Liss and/or Doctor Nudelman concerning your theory that the emotional or psychological involvemen tof Mrs. Cohn would somehow extend the discovery doctrine under the statute of limitations? Had you ever discussed that with them prior to that letter marked—
A. Prior to January 17th?
Q. Yes, sir.
A. Yes.
Q. When did you first discuss that situation with Doctor Liss?
A. I couldn't honestly give you a date.
Q. It was well after the commencement of this lawsuit, was it not?
A. Yes. Because the problem hadn't arisen.
Q. And your first discussion with Doctor Nudelman was also well after the institution of this lawsuit. Isn't that true?
A. Yes. If you define—well—
Q. Months?
A. Months?
Q. Months?
A. Yes.
Q. Better than a year?

A. It started I believe in—yes, the answer would be yes.

Q. Thank you.

Tr. at 22-25.

Furthermore, the doctors speak of Mrs. Cohn's barbituate incident in 1971 as a suicide attempt and conclude that any pressing of her legal action may have resulted in a complete suicide. Yet, at deposition, Mrs. Cohn testified with reference to the sleeping pill incident in 1971 as follows:

Q. Were you ever in a hospital for any reaction to drugs?

A. Yes.

Q. Tell me about that, please.

A. There was a time when I took too many sleeping pills for the middle of the day. It was five pills but I guess it's a lot for noontime. My daughter saw this empty bottle and didn't know what it was, and she called the ambulance and they hustled me up to St. Barnabas. I guess I stayed there until the drug wore off.

Q. When you took these five pills, did you realize what you were doing?

A. Yes. I was taking five sleeping pills.

Q. *With any motive in mind?*

A. *I had a terrible headache* and I wanted to get away from it. *Usually it took me five sleeping pills to go to sleep at night.*

Q. *Do you thnik that the people who saw you doing this overreacted?*

A. *Yes.* They didn't see me do it.

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

> Q. Well, from whatever they found out at the time, it's your opinion that they overreacted?
> A. *Yes. I know they overreacted.* Yes.

Mrs. Cohn Dep. at 72-72 (emphasis added).

The noticeable delay in the issuance of correlating conclusions by all three doctors, in particular by Dr. Shuttleworth, as well as their description of the barbituate incident lead this Court to take a skeptical view of their accuracy. As Judge Goettel aptly pointed out in *Graboi* v. *Kibel, supra*: "[c]ertainly the Court is not required, as urged by plaintiff, to accept the conclusions of plaintiff's expert[s], retained after the commencement of litigation." 432 F.Supp. at 579.

Moreover, a brief review of the history of this litigation demonstrates that plaintiffs have noticeably shifted positions. In a previous brief filed with this Court, Mr. Cohn stated that both he and his wife "diligently endeavored to establish a concrete casual [sic, causal] link between 'Enovid' and the C.V.A. of Susan Cohn." Plaintiffs' [first] Brief marked in evidence, Exhibit D-9, p4. Plaintiff continued: "It was not until the latter portion of 1973 however that the medical evidence linking 'Enovid' to the occurrence of C.V.A. came to light. Following the strength of this evidence, suit was filed with dispatch. The delay in filing suit was due *solely* to the lack of concrete evidence." *Id.* at 5 (emphasis added). Mr. Cohn then suggested that if Searle had disclosed certain information to the public and medical profession "it is possible plaintiffs could have discovered the cause of Susan Cohn's C.V.A. prior to the latter portion of 1973." *Id.* Not one word was ever directed to this Court concerning the theory of mental disability.

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

The fact Mrs. Cohn took it upon herself to establish concrete medical evidence, *id.* at 4, and brought articles linking oral contraceptives and thrombosis to her husband's attention, Mrs. Cohn Dep. at 11, is clearly inconsistent with one being unable to even understand her legal rights or to even discuss the possibility of initiating legal action.[14]

The definition of insanity as interpreted in *Kyle* is a pragmatic one, taking into consideration all relevant facts and circumstances. The New Jersey Supreme Court in *Kyle* recognized the important equitable policy behind N.J.S.A. 2A:14-21 to toll the running of the statute of limitations where a party lacks the ability and capacity, due to infancy or mental infliction, to pursue her lawful rights. However, the standard set forth in *Kyle* does not automatically encompass every mental or emotional disorder. Not all rise to the level of statutory insanity. Like physical injuries, mental afflictions can be successfully treated through counseling or medical advice. In the interim, most persons so inflicted can still manage to a fair degree of success their own affairs.

From all the evidence before me, it is clear that Mrs. Cohn was sufficiently able to manage her affairs and to collect pertinent medical information for the institution of a possible suit to redress the injuries incurred. She was able to cook, perform a number of household activities, drive a car, and otherwise lead an independent and

---

[14] Such activities are, in addition, difficult to reconcile with Dr. Shuttleworth's conclusion that pressing the issue of legal action during the years 1965 to 1973 could have produced the unpredictable risk of a complete suicide. Plaintiffs' Exhibit P-6.

active life. Tr. at 27-34. In addition, she endeavored to ferret out medical evidence which might form the basis of an actionable claim. Her activities, therefore, lead this Court to believe that Mrs. Cohn was aware of, and able to deal with this cause of action.

While the medical evidence is to the contrary, this Court is not bound by said determination, *Graboi, supra,* 432 F. Supp. at 572. The circumstances of this case do not warrant a finding of disability within the meaning of N.J.S.A. 2A:14-21. As pointed out hereinbefore, plaintiffs have significantly shifted from their original position and arguments. In 1974, when suit was instituted, Mrs. Cohn's depression was never brought to this Court's attention. Now, for the first time, plaintiffs contend her depression was so severe that it rises to the level of a disability within the meaning of N.J.S.A. 2A:14-21. The fact a mental disorder of such magnitude was never before mentioned places the seriousness of such condition in considerable doubt. Moreover, only Dr. Shuttleworth's later reports coincide with the conclusions of the other doctors. In 1974, when Mrs. Cohn presumably was emerging from the critical stages of her depression, Dr. Shuttleworth, her psychiatrist during this period, made absolutely no mention of a severe emotional disability so as to preclude legal action. The foregoing facts, therefore, cast doubt upon the accuracy of the medical reports and plaintiffs' present allegations.

Moreover,, Mr. Cohn did not have to wait until 1974 before being able to discuss the suit with Mrs. Cohn. She was his wife. He knew of and could very well relate the tragic events which took place. This is not the ordinary situation where a medical malpractice plaintiff is forced to divulge the unpleasant details of unsuccessful surgery

Second Opinion of the United States District Court for the District of New Jersey, Filed July 26, 1979

or medical diagnosis to an unfamiliar attorney. Rather, Mr. Cohn was (and remains) her husband. He was as familiar as she with the injuries suffered, having been married to her since 1951. Upon discovery of the coagulant effects of oral contraceptives in early 1970, suit should have been promptly initiated.

Accordingly, in view of the foregoing facts and circumstances, I find that Mrs. Cohn's alleged depression did not constitute a disability within the meaning of N.J.S.A. 2A:14-21 so as to toll the running of N.J.S.A. 2A:14-2. Defendant's summary judgment motion is granted, as the within action is time-barred under N.J.S.A. 2A:14-2.

The defendant will submit an appropriate order within 10 days.

DATED: July 26, 1979.

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1881

ROY HOPKINS

vs.

KELSEY-HAYES, INC.,

Appellant

(D. C. Civil No. 78-1646)

Nos. 79-2406 and 79-2605

SUSAN COHN and WALTER R. COHN, her husband,

Appellants in No. 79-2406

vs.

G. D. SEARLE & COMPANY,

Appellant in No. 79-2605

(D. C. Civil No. 74-0450)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Judgment of the United States Court of Appeals for the Third Circuit

PRESENT: ADAMS, VAN DUSEN AND GARTH, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel on February 11, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 27, 1979 and appealed at our No. 79-1881, be, and the same is hereby affirmed, and the judgment of the said District Court filed August 6, 1979 and appealed at our Nos. 79-2406 and 79-2605, be, and the same is hereby reversed, and the causes are remanded to the particular District Court for further proceedings consistent with the opinion of this Court. Costs in each case are taxed against the respective defendant.

ATTEST:

THOMAS QUINN
Clerk

July 23, 1980

N.J. Ct. R. 4:4-4(c) (1) (The Long-Arm Rule)

4:4-4. Summons; Personal Service; In Personam Jurisdiction

Service of summons, writs and complaints shall be made as follows:

• • •

(c) Corporations, Partnerships and Associations

(1) Corporations. Upon a domestic or foreign corporation, by serving, in the manner prescribed in paragraph (a), either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then, it may be upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

N.J. R.R. 4:4-4(d) (The Long Arm Rule)— Superceded in 1958 by N.J. Ct. R. 4:4-4(c) (1)

4:4-4. Summons: Personal Service

The summons and a copy of the complaint shall be served together. The plaintiff shall furnish the person making service with the original and a copy of the summons and as many additional copies thereof, each with a copy of the complaint annexed, as there are persons to be served. Service shall be made as follows:

• • •

(d) Upon a domestic or foreign corporation, by serving, in the manner prescribed in paragraph (a), an officer, director, trustee or a managing or general agent; or if service cannot be made upon any of the foregoing and if there is no office or place of business within this State, by serving any servant of the corporation within this State acting in the discharge of his duties; or by delivering a copy of the summonses and complaint to any person authorized by appointment or by law to receive service of process on behalf of the corporation; or by leaving a copy of the same at the registered office of the corporation with any person in charge thereof;

N.J.S.A. 2A:14-2 (The Statute of Limitations)

2A:14-2. 2 YEARS; ACTIONS FOR INJURIES TO PERSON BY WRONGFUL ACT

Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

N.J.S.A. 2A:14-22 (The Tolling Statute)

2A:14-22. NONRESIDENCE OF PERSON LIABLE

If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

Supreme Court, U. S.
FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

80-644
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G.D. SEARLE & COMPANY,

Petitioner,

vs.

SUSAN COHN and WALTER COHN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

WALTER R. COHN,
Attorney for Respondents,
15 Valley Street,
South Orange, New Jersey 07079.
(201) 762-6444

Adams Press Corp., 3 Commerce Street, Newark, N. J. 07102—(201) 623-5611

Questions Presented

1. Whether the New Jersey Tolling Provision, N.J.S.A. 2A:14-22 is a constitutionally valid legislative enactment, providing a rational basis for acknowledging the degrees of difficulty of service of process as between represented foreign corporations and non-represented foreign corporations.

2. Whether a Court may imply terms beyond the clear language and intent of the New Jersey Legislature so as to substitute its judgment for that of the Legislature.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT—The constitutional validity of the New Jersey Tolling Provision has been upheld against multiple challenges by the United States District Court for the District of New Jersey, the New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit, and there is no need for this Court to hear the matter further	6
The New Jersey Tolling Statute has a rational basis and furthers a constitutionally permissible goal	10
Courts are not to interpose their own judgment in contravention of the plain language and clear intent of a state statute	15
CONCLUSION	18
APPENDIX A—Opinion of the Supreme Court of New Jersey Re: Konstantinos Velmohos v. Maren Engineering Corporation, et al.	1a
APPENDIX B—Opinion of the United States District Court Re: Roy Hopkins v. Kelsey-Hayes, Inc.	24a

PAGE

Cases Cited

Cohn v. G. D. Searle and Co., 447 F. Supp. 903 (D.N.J. 1978), rev'd —— F.2d —— (Docket Nos. 79-2406 and 79-2605, 3rd Cir. July 23, 1980) 1, 2, 4, 5, 7, 11, 12, 15, 16

Cleveland v. National College of Business, 435 U.S. 213 (1978) 10

Eli Lilly and Co. v. Sav-On Drugs, Inc., 366 U.S. 276 (1961) 17

Harwitch v. Adams, 52 Del. 13, 151 A.2d 286 (Super. Ch. Del.) aff'd 52 Del. 247, 155 A.2d 591 (Del. 1959) 8

Heiner v. Donnan, 285 U.S. 312 (1932) 13

Hopkins v. Kelsey-Hayes Inc., 463 F. Supp. 539 (D.N.J. 1978), aff'd —— F.2d —— (Docket No. 79-1881, 3rd Cir. July 23, 1980) 5, 15, 16

Malmed v. Thornburgh, —— F.2d —— (Docket No. 79-2467, 3rd Cir. May 13, 1980) 11

Reed v. Reed, 404 U.S. 71 (1971) 11, 12

Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 12

Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914) 17

Velmohos v. Maren Engineering Corp., 83 N.J. 282, 416 A.2d 372 (1980) 5, 7, 9, 14-18

Vlandis v. Kline, 412 U.S. 441 (1973) 13

Will v. Malosky, 432 Pa. 246, 247 A.2d 788 (1968) 8

United States Constitution Cited

Fourteenth Amendment 11

PAGE

Statutes Cited

N.J.S.A. 2A:14-2 ..... 3, 9
N.J.S.A. 2A:14-21 4
N.J.S.A. 2A:14-22 ..... i, 4, 6, 10
28 U.S.C.:
Sec. 1332 3
Sec. 1441 3

Rules Cited

New Jersey Rule 4:4-4(c)(1) 9
Supreme Court Rule 17 7

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G.D. SEARLE & COMPANY,

Petitioner,

vs.

SUSAN COHN and WALTER COHN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Opinions Below

The opinion delivered in the court below is not as yet officially reported, but is appended to the Petition for a Writ of Certiorari. *Cohn* v. *G. D. Searle & Co.*, —— F.2d —— (Docket Nos. 79-2605 & 79-2406, 3rd Cir. July 23, 1980).

The decision of United States District Court for the District of New Jersey appears at 447 F. Supp. 903 (D.N.J. 1978). It is also appended to the Petition for a Writ of Certiorari.

Jurisdiction

Respondent does not question the jursdiction as set forth in the Petition.

Constitutional Provisions, Statutes and Rules Involved

Respondent does not assert that any additional Constitutional Provisions, Statutes and Rules other than those set out in the Petition are necessary for disposition of the Petition.

Statement of the Case

On December 22, 1963, Plaintiff-Respondent Susan Cohn suffered a cerebral vascular accident, allegedly as a result of the ingestion of a birth control pill. That stroke has left her permanently paralyzed on her left side. The pill was manufactured by Defendant-Petitioner, G. D. Searle & Co., a Delaware corporation with its principal office in Illinois. At that time, the hormonal concentration contained in the pill was much greater than today and there was no warning nor available medical evidence linking the ingestion of birth control pills with severe side effects.

Plaintiffs-Respondents Susan Cohn and Walter R. Cohn, her husband, initiated suit against Defendant-Petitioner on January 29, 1974. Their Complaint, predicated on theories of negligence, breach of warranty, statutory violations and strict liability, was filed in the Superior Court of New Jersey, Law Division, Essex County. On April 1, 1974, the case was removed by Defendant to the United States District Court for the District of New Jersey, pursuant to 28 U.S.C. Section 1441. Jurisdiction was vested in the United States District Court under 28 U.S.C. Section 1332.

On September 8, 1975, Defendant made application to the Court for an order entering summary judgment and dismissing the complaint with prejudice, on the grounds that the action was barred by the Statute of Limitations, N.J.S.A. 2A:14-2. In reply to Plaintiffs' argument that the Defendant was a foreign corporation not represented within the state by "any person or officer" upon whom process could be served, Defendant contended that since the corporation was at all times subject to New Jersey long-arm jurisdiction, the application of the tolling statute violated the equal protection and due process clauses of the United States Constitution.

The opinion of the Court was published at 447 F. Supp. 903 (1978). The court found two issues of first impression: 1) whether or not amenability to long-arm jursdiction created a "representation" within the state within the meaning of the tolling statute, N.J.S.A. 2A:14-22; and 2) whether or not the tolling statute as applied to a foreign corporation subject to long-arm jurisdiction violated the equal protection clause of the United States Constitution. The Court decided the former in the negative. *Id.* at 910. However, as to the latter, the Court found that the statute denied equal protection to foreign corporations amenable to long-arm jurisdiction. *Id.* at 912.

On July 26, 1979, the Court rendered a second opinion, after a hearing on the issue of whether or not Plaintiffs were entitled to the benefit of New Jersey's equitable discovery rule. This second opinion is unpublished. In that opinion, the trial Court found that Plaintiffs were entitled to the benefit of the equitable discovery rule because concrete medical evidence linking Enovid (the drug manufactured by Defendant) was not discoverable until 1970. Having established 1970 as a date from which the cause of action commenced, the second issue decided was whether or not Plaintiffs were entitled to relief due to alleged disability of Mrs. Cohn who, in 1970, was laboring under a severe depression which lasted until 1974. As to this issue, the Court found that "severe depression" was not a disability as contemplated by the New Jersey statute. N.J. S.A. 2A:14-21.

Plaintiffs moved before the Court for a new trial, which request was denied by the Hon. Curtis Meanor on August 29, 1979. A Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed on September 14, 1979 and was docketed on October 9, 1979. On October 18, 1979, Defendant-Respondent filed a Notice of Cross-

Appeal. The case of *Cohn* v. *Searle* was consolidated for purposes of argument and decision with the case of *Hopkins* v. *Kelsey-Hayes, Inc.*

While *Cohn* and *Hopkins* were pending before The Third Circuit, the New Jersey Supreme Court was deciding *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 415 A.2d 372 (1980) a case involving essentially the same issues. The *Velmohos* decision held that the New Jersey Legislature had decided to maintain the Tolling Provision intact. The statute acts to preserve a potential plaintiff's cause of action where the defendant might not be amenable to long-arm jurisdiction because its whereabouts outside the State are not readily discernible. The object of the Legislature was to deny to a foreign corporation without an agent upon whom process might be served the unjust reward of immunity from suit because it was secreted from view. The possible use of long-arm jurisdiction over certain corporations was held not to be duplicative of the Tolling Provision because long-arm service is not available in those instances where the potential New Jersey litigant cannot guess among which of the other 49 states to search for the defendant. Therefore, because the statute is rationally related to achieving a constitutionally permissible objective, the Tolling Provision was upheld by the New Jersey Supreme Court.

The Third Circuit also rejected the constitutional claims advanced by the out-of-state defendants because they were not amenable to in-state service of process because they did not have a registered agent. Again, the presumption of validity given to legislative enactments and the certain, rational basis of the statute in achieving its constitutionally permissible purpose provided the foundation for the upholding of the Tolling Provision.

The July 23, 1980 decision of the Third Circuit remanded this case to the Federal District Court in order that the trial on the merits might proceed. Defendant-Petitioner filed its petition seeking a Writ of Certiorari on October 21, 1980.

ARGUMENT

The constitutional validity of the New Jersey Tolling Provision has been upheld against multiple challenges by the United States District Court for the District of New Jersey, the New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit, and there is no need for this Court to hear the matter further.

The granting of a writ of certiorari is not a matter of right, but of sound judicial discretion, and thus is to be granted only where there are special and important reasons for doing so. There are none in the instant case. The primary reason that this Court should deny the petition for writ of certiorari is the firmness of the decisions of the United States Court of Appeals for the Third Circuit and the New Jersey Supreme Court. Petitioner has failed to show that the disposition of this case by the Third Circuit has created any need for the granting of a writ by this Court.

Petitioner alleges that the New Jersey Statute of Limitations Tolling Provision, N.J.S.A. 2A:14-22, violates established principals of Due Process and Equal Protection. The issue is whether or not the Legislature of the State of New Jersey may constitutionally differentiate between foreign corporations represented in the State by an officer upon whom process may be served, and foreign corporations

which are not represented for purposes of service of process. The recent decision of the United States Courts of Appeals for the Third Circuit in the consolidated cases of *Cohn* v. *G. D. Searle & Co.*, —— F.2d —— (Docket Nos. 79-2406 and 79-2605, 3rd Cir. July 23, 1980) and *Hopkins* v. *Kelsey-Hayes, Inc.*, —— F.2d —— (Docket No. 79-1881, 3rd Cir. July 23, 1980) resolved the conflicting opinions of parallel judges in the Federal District Courts for the District of New Jersey.[1] Nonetheless, Petitioner offers as a reason for the granting of its petition the argument that "the Third Circuit's adoption of that decision in the instant case causes confusion within the Circuit . . ."[2]. This statement is clearly erroneous. Any possible earlier confuion was decisively extinguished by the determination of the United States Court of Appeals (See Supreme Court Rule 17).

Petitioner also seeks the granting of a writ on the basis that the Third Circuit's opinion "conflicts with the opinions of other state courts of last resort"[3]. The New Jersey Supreme Court completely rebutted Petitioner's contention in *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980). In *Velmohos*, Justice Pashman speaking for the majority stated that the New Jersey tolling statute is narrowly drawn and deals with "representation" not with "absence" as do other state statutes:

> . . . While courts of other states have construed tolling statutes to be inapplicable to foreign cor-

---

[1] See *Cohn* v. *Searle*, 447 F. Supp. 903 (D.N.J. 1978), rev'd —— F.2d —— (3rd Cir. July 23, 1980) (Petitioner's Appendix p. 28a).

[2] Page 8, Petition for Writ of Certiorari.

[3] Page 8, Petition for Writ of Certiorari.

> porations subject to long-arm service, the statutes involved were phrased in terms of 'absence' from the states—general language which more readily lends itself to flexible interpretation.
>
> • • •
>
> The New Jersey statute, however, is very narrowly drawn. It speaks not of presence or absence, but of *representation* within the State.

Id., Respondent's Appendix at p. 12a.

Further, in a footnote reply to the dissent of Justice Sullivan, Justice Pashman stated:

> For this reason, my Brother Sullivan's observation that our holding "places this Court with a minority of jurisdictions," post at —— (slip op. at 2), is misleading. Our result today differs from those of other courts because of a difference in statutory language, not a defect in reasoning. Without describing and comparing the various tolling statutes that have been interpreted, any reference to "majority" and "minority" rules is meaningless. *Id.* footnote at 8.

The fact that appellate courts of other states have ruled that non-resident defendants amenable to service of process are not subject to their respective tolling statutes can provide Petitioner with no solace. In those cases the courts ruled on statutory not constitutional grounds. *Harwitch* v. *Adams*, 52 Del. 13, 151 A.2d 286 (Super. Ch. Del.) aff'd, 52 Del. 247, 155 A.2d 591 (Del. 1959); *Will* v. *Malosky*, 432 Pa. 246, 247 A.2d 788 (1968). Construction of those statutes was based on legislative histories and policies as well as language which differs from that of the New Jersey statute. Uniformity among the states in the enactment

of statutes is not required. Federal courts are bound by the construction of the state's highest court. The construction of the New Jersey statute by the New Jersey Supreme Court in *Velmohos, supra,* is controlling. For the purpose of service of process upon a foreign corporation, the New Jersey Legislature saw fit to delineate between in-state "representation" and "presence or absence". Other state legislatures did not. Both the New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit examined the specific statutory language and are in accord that there is a rational, constitutionally permissible basis for the New Jersey tolling statute.

Notwithstanding the above, Petitioner persists in its argument that amenability to service of process under the New Jersey Court "long-arm" rule, N.J.R. 4:4-4(c)(1) is synonymous with "presence" in the state for purposes of compliance with New Jersey's Statute of Limitations for Personal Injury Actions, N.J.S.A. 2A:14-2. It is upon this flawed analogy that Petitioner grounds its argument that unrepresented foreign corporations are deprived of the constitutional rights to due process and equal protection of the law.

Extra-territorial service is not simply an alternative to service within the State. *Velmohos, supra,* at 296. Under New Jersey Court Rule, N.J.R. 4:4-4(c)(1), long-arm service requires the plaintiff to first attempt to make service within New Jersey. If this fails, plaintiff can serve extra-territorially only "(i)f it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made." N.J.R. 4:4-4(c)(1). Furthermore, the affidavit must satisfy a court that service will be consistent with due process of law. *Velmohos, supra* at 296. But the availability of long-arm jurisdiction is of no significance

in those instances where the future out-of-state defendant is not readily visible to a potential plaintiff. If the corporation cannot be readily located, the availability of long-arm jurisdiction is moot.

The New Jersey Legislature chose not to give the benefit of the statute of limitations defense to certain foreign corporations, those not represented in New Jersey. This decision was made because these defendants, in general, present plaintiffs with problems in executing service of process. A plaintiff may very well not know in which of the remaining 49 states to begin looking for a non-represented corporate defendant. The fact that some non-represented defendants may be easily servable is of no consequence. The equal protection clause does not require that statutes be drawn with mathematical nicety. *Cleveland* v. *National College of Business*, 435 U.S. 213, 221 (1978). The New Jersey Legislature created a rational classification by distinguishing between the "presence" of an in-state agent of a foreign corporation who is amenable to service of process and a foreign corporation without an agent for service of process. The distinction in the degrees of difficulty in executing service substantiates the rationale of this legislative classification and there is no need for this Court to further review the constitutionality of the statute.

The New Jersey Tolling Statute has a rational basis and furthers a constitutionally permissible goal.

Equal protection and due process questions are first evaluated by reference to the appropriate constitutional standard. Petitioner contends that N.J.S.A. 2A:14-22, by treating foreign corporations without representation in New Jersey differently than foreign corporations registered in New Jersey, violates the Equal Protection Clause

of the Fourteenth Amendment and denies substantive due process. There is no fundamental interest or suspect classification involved with the tolling statute. *See Cohn, supra,* at Petitioner's Appendix, p. 18a. Therefore, because the rational basis test applies, Petitioner must meet the heavy burden of showing that the statute is irrational. It has not done so.

> In reviewing a state statute or constitutional provision under the due process or equal protection clause, a court must determine if the provision rationally furthers any legitimate state objective. "For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision . . ." *Flemming* v. *Nestor,* 363 U.S. 603, 612 (1960). The court may even hyopthesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack. See *Weinberger* v. *Salfii,* 422 U.S. 749, 780 (1975); *Williamson* v. *Lee Optical Inc.,* 348 U.S. 483, 487-490 (1955); *Trafelet* v. *Thompson,* 594 F.2d 623, 626 (7th Cir.), cert. denied, —— U.S. ——, 48 U.S.L.W. 3239 (Oct. 1, 1979).

Cohn, supra, at Petitioner's Appendix, p. 19a, quoting *Malmed* v. *Thornburgh,* No. 79-2467, slip op. at 7, (3rd Cir. May 13, 1980) (Aldisert, J.) (emphasis in original).

In support of its equal protection argument, Petitioner relies on *Reed* v. *Reed,* 404 U.S. 71 (1971). *Reed* involved a challenge to an Idaho statute which preferred males to females among relatives of the same degree in situations where there was competition to administer intestate estates. The United States Supreme Court reversed the Idaho Supreme Court on the basis that a choice mandated solely on the basis of sex involves a suspect classification for purposes of a challenge under the Equal Protection

Clause, and such a classification is, therefore, subject to strict scrutiny. The absence of a compelling state interest in preferring males to females required the Idaho statute to be struck down. It is an anomaly that Petitioner cites such a clearly distinguishable case as *Reed.* In the case *sub judice,* the standard for review of the New Jersey statute is whether or not it has a rational basis. *Cohn, supra,* at Petitioner's Appendix p. 18a. The statute clearly passes such a review and Petitioner's references to "suspect classification" cases are misleading.

Petitioner also relies upon *Royster Guano Co.* v. *Virginia,* 253 U.S. 412 (1920) wherein a Virginia taxing statute was declared discriminatory in that it created an illusory classification between domestic corporations deriving profits from business done within the state and domestic corporations deriving income solely outside the state. The arbitrary distinction created by the State Legislature in *Royster,* imposed a tax burden on the former, but not on the latter. There, no permissible rational basis existed for favoring certain domestic corporations over others. In the instant case, the United States Court of Appeals for the Third Circuit, the New Jersey Supreme Court and one Federal District Court for the District of New Jersey have declared the tolling provision to be rationally related to achieving a constitutionally permissible goal.

Petitioner also argues that the New Jersey tolling statute offends the Due Process Clause of the United States Constitution. It theorizes[4] that the construction of this statute *by the courts* creates a conclusive presumption which, in turn, is irrational and, therefore, a deprivation of due process of law. The logic of this argument is fallacious, created only by an unjustified manipulation of words.

---

[4] Page 11, Petition for Writ of Certiorari.

Petitioner offers no citation for this creation of an irrebutable presumption. To be declared offensive, statutory presumptions must be contained within the ambit of the language of the statute under attack. Courts have been constantly restrained from imposing additional meaning upon plain language and prevented from stepping into the province of legislative bodies. While *Vlandis* v. *Kline*, 412 U.S. 441 (1973), cited by Petitioner, does concern a statute creating a permanent irrebutable presumption, it is not authority for the specious argument that an irrebutable presumption may be created by judicial construction of a statute and that such construction renders the statute unconstitutional. *Heiner* v. *Donnan*, 285 U.S. 312 (1932) also cited by Petitioner, likewise fails to support its theory. In *Heiner*, a constitutional challenge was made to a federal statute which created a conclusive presumption that gifts made within two years prior to the donor's death were made in contemplation of death, thus requiring payment of a higher estate tax. In both *Vlandis* and *Heiner*, the irrebutable presumption was found within the statute under attack. In the instant case, not only is there no irrebutable presumption implied by the construction of a court below, but Petitioner similarly fails to substantiate or even put forth a claim of an impermissible irrebutable presumption contained in the specific language of the statute itself.

Both the New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit have acknowledged that the Tolling Provision falls easily within the ambit of the rational basis standard. Writing for the New Jersey Supreme Court, Justice Pashman stated:

> The flaw in defendants' argument is that it recognizes as rational only a distinction based on the impossibility of obtaining jurisdiction over a for-

> eign corporation. It refuses to acknowledge that among amenable foreign corporations there are *degrees of difficulty* in effecting service. A recognition of these degrees of difficulty supplies a present rational basis for distinguishing between represented corporations and those unrepresented but amenable to long-arm service.
>
> The purpose of the statute is not confined to providing relief when service is impossible . . . See *Fidelity Deposit Co. of Maryland* v. *Abagnale*, 97 N.J. Super. at 143-144, 234 A.2d 511. There is a conceivable rational basis to support tolling.
>
> The view might have been taken that the facility of extra-territorial service did not meet the hardship of locating a departed resident in the sprawling country beyond New Jersey's borders. (*Id.* at 144, 234 A.2d at 518).

Velmohos, supra, at Respondent's Appendix, p. 17a-18a (emphasis added).

The strongest foundation upon which the rational basis of the tolling provision rests was cogently stated by Justice Garth of the Third Circuit:

> This distinction between represented and non-represented foreign corporations reflects the pragmatic difficulties which may be encountered by plaintiffs suing foreign corporations. Since service of process under the long-arm statute is more difficult and time-consuming to achieve than service within the state, and since out-of-state, non-represented corporate defendants may be difficult to locate, let alone serve, tolling the statute of limitations protects New Jersey plaintiffs and facilitates their lawsuits against such defendants. Because the tolling provision fulfills the

> legitimate state purpose of easing the special burdens of suits against non-represented foreign corporations, we cannot say that the distinction which it recognizes is irrational.

Cohn, supra, Petitioner's Appendix, p. 23a; *Accord*: *Hopkins* v. *Kelsey-Hayes,* 463 F. Supp. 539, 542 (D.N.J. 1978).

While large national and multi-national entities may or may not be visible, there remains a plethora of other non-represented corporate defendants safely secreted from view. A denial of the validity of the Tolling Provision would prevent New Jersey plaintiffs with a justiciable cause from obtaining possible redress. When the corporation may be served in the State, jurisdiction may be obtained with relative ease. When the defendant is not represented in the State, a plaintiff should not be forced to commence to search through the other 49 states to find the defendant. Though some non-represented defendants may be servable because of their out-of-state visibility, the New Jersey statute ensures that defendants which are not easily located will not be unjustly shielded from potential lawsuits. The rational basis of the New Jersey statute has been evaluated, confirmed, and re-confirmed. There is no need for this Court to re-examine the statute.

Courts are not to interpose their own judgment in contravention of the plain language and clear intent of a state statute.

Petitioner's equal protection argument, aside from being facially unsound, would, if successful, have the negative impact of sanctioning partial repeal of a legislative enactment by a judicially-created Rule of Court. *Vel-*

mohos, supra, at Respondent's Appendix, p. 12a. Such a determination would result in a collision of the authority of two branches of government, contrary to the rule of separation of powers. The Third Circuit in *Cohn, supra,* and the New Jersey Supreme Court in *Velmohos, supra,* both concluded that the New Jersey statute satisfies constitutional standards. Because the heavy presumption of the validity of a legislative enactment has not been even remotely displaced by the arguments advanced by Petitioner, this Court should not issue a Writ of Certiorari.

The Petitioner seeks to have this Court construe a state statute so as to render it ineffective, i.e. by declaring the Tolling Provision a nullity because some non-represented foreign corporations which commit torts within the state might possibly be amenable to long-arm service. This argument has been strongly rejected. *See*: *Hopkins, supra,* Respondent's Appendix at p. 29a by Judge Brotman. Referring to the New Jersey Supreme Court opinion in *Velmohos, supra,* Circuit Judge Garth noted that the defendants sought to have the Tolling Provision's phrase "not represented" interpreted as "not amenable to service", in total disregard of the Legislature's plain language and stated purpose. See *Velmohos, supra,* Respondent's Appendix at p. 12a, referring to "Statement Accompanying Assembly No. 467 (1949)".

Since long-arm jurisdiction did not exist at the time of the enactment of the tolling provision, the statute's phrase "representation by a corporation" could not have included amenability to long-arm jurisdiction. Therefore, the Tolling Provision and long-arm jurisdiction are not alternatives. Rather, they each serve an independent purpose. The Tolling Provision operates to ensure that a plaintiff's cause of action will be preserved against a non-represented foreign corporation which might otherwise be shielded

from long-arm jurisdiction because it is not readily visible. See *Velmohos, supra,* Respondent's Appendix at p. 14a. Thus, only through a tortured interpretation of both the statute's plain language and the Legislature's clear intent can the Petitioner's "duplication of purpose" argument prevail.

The third argument advanced by Petitioner is that the New Jersey tolling statute places an undue burden on interstate commerce. Reliance is placed by Petitioner on cases in which the out-of-state corporate defendants, engaged solely in interstate commerce, were required to perform an affirmative act, such as obtaining a certificate of authority, before doing business in the forum state. *Eli Lilly & Co.* v. *Sav-On Drugs, Inc.,* 366 U.S. 276 (1961). By contrast, the New Jersey tolling statute places absolutely no affirmative requirement, by way of filing, taxing or otherwise, on an out-of-state corporate defendant. Rather, they are unable to avail themselves of an affirmative *defense,* and then only in a limited number of cases. The availability of such a defense to those legitimately within the statutory class should not be construed as a "burden" on those who are not a part of the protected statutory scheme.

The Petitioner's reference to *Sioux Remedy Co.* v. *Cope,* 235 U.S. 197 (1914)[5], is completely specious. That case involved a corporation's rights to sue others. Such an issue is not present in the instant case, nor is it relevant as the Petitioner has never contended it did not have the right to sue in the Courts of New Jersey. Thus, the legislative enactment involved in the case *sub judice* in no way impairs the opportunity of an out-of-state corporation to operate in New Jersey. Petitioner's argu-

[5] Page 15, Petition for Writ of Certiorari.

ment that a plaintiff could wait for decades before commencing suit was effectively rebutted by Justice Pashman:

> "The defense of laches remains available to a defendant in any event." *Velmohos, supra,* Respondent's Appendix. p. 14a.

CONCLUSION

The United States Court of Appeals for the Third Circuit and the New Jersey Supreme Court have concluded decisively that the Tolling Provision enacted by the New Jersey Legislature is rationally related to a constitutionally permissible objective. Because there is no conflict between the Federal Courts and the State Courts, there is no necessity for this Court to hear the matter further and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WALTER R. COHN,
Attorney for Respondents,
15 Valley Street,
South Orange, New Jersey 07079.
(201) 762-6444

Dated: November 19, 1980

APPENDIX A

Opinion of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY
A-72/143 September Term 1979

KONSTANTINOS VELMOHOS, also known as VELMOHOS KONSTANTINOS,

Plaintiff-Respondent,

v.

MAREN ENGINEERING CORPORATION, an Illinois corporation, and AIR CONVEYING, INC., an Illinois corporation,

Defendants-Appellants,

and

NADUSTCO, INC., a Louisiana corporation,

Defendant.

Argued March 17, 1980—Decided June 18, 1980

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 168 N.J. Super. 520 (1979).

WILLIAM K. LEWIS argued the cause for appellant Maren Engineering Corporation (SHANLEY & FISHER, attorneys; MR. LEWIS and MOLLY B. CANNON, on the briefs.).

Appendix A

JOSEPH DIRIENZO argued the cause for appellant Air Conveying, Inc.

BARRY A. WEISBERG argued the cause for respondent (EDWARD J. DOLAN, attorney).

The opinion of the Court was delivered by PASHMAN, J.

This case raises the question whether the tolling provision of New Jersey's statutes of limitations, N.J.S.A. 2A:14-22, is unconstitutional as applied to foreign corporations that are not represented within the State but are amenable to long-arm service. Invalidation of the statute would render defendant corporations immune from suit in this State, since without the benefit of the tolling statute, the relevant limitations period has expired. We find the statute constitutional and accordingly uphold plaintiff's action as timely.

I

The facts are essentially undisputed. On June 4, 1976, plaintiff filed a complaint in the Superior Court, Law Division, seeking damages for personal injuries sustained by him on August 3, 1973,[1] as a result of an allegedly defective shredder-baler machine manufactured by Maren

---

[1] Plaintiff's foot was caught in a conveyor which then drew his entire body into a machine. The accident occurred in the course of plaintiff's employment by Container Corporation of America in New Brunswick, New Jersey. Plaintiff successfully pursued a Worker's Compensation claim against his employer. He was found to have a 5% total permanent neurological disability and a 28⅓% total permanent orthopedic disability.

Engineering Corporation (Maren), an Illinois corporation.[2] The complaint was later amended to include claims against Air Conveying Corporation (Air Conveying), the designer of the machine, also an Illinois corporation.[3]

Both Maren and Air Conveying raised as a defense plaintiff's failure to file suit within the applicable two-year limitations period for personal injury actions. N.J.S.A. 2A: 14-2. Plaintiff asserted that because neither defendant maintained registered offices or agents for services of process in New Jersey, N.J.S.A. 2A:14-22 tolled the statute of limitations and plaintiff's claim was timely.

On motions for summary judgment defendants claimed that New Jersey's tolling statute employed an unconstitutional classification in distinguishing between foreign corporations represented in New Jersey and foreign corporations which were unrepresented but amenable to long-arm service. In support of this contention, they cited *Cohn* v. *G. D. Searle & Co.*, 447 F.Supp. 903 (D.N.J. 1978). In that case the federal district court found that the differing treatment lacked any rational basis. It therefore held New Jer-

---

[2] The complaint also named as a defendant George Swan, individually and trading as Swan Engineering Company, a New Jersey entity. By stipulation the complaint was dismissed as to Swan with prejudice on February 3, 1977.

[3] The amended complaint also added claims against Nadustco, Inc., a Delaware corporation with its principal office in New Orleans, Louisiana. However, Nadustco maintained an agent for service of process in New Jersey and was therefore not subject to the tolling statute. It sought dismissal from the action on the ground that the statute of limitations barred suit. Plaintiff did not oppose the motion, and the trial judge granted Nadustco summary judgment on August 22, 1977.

sey's tolling statute unconstitutional as applied to unrepresented foreign corporate defendants amenable to long-arm service.

The trial court adopted the reasoning of the *Cohn* decision. After requiring the defendants to demonstrate their amenability to long-arm service during the period in question,[4] the court granted their motions for dismissal. Plaintiff appealed to the Appellate Division.

Finding no basis for distinguishing the decision in *Lemke* v. *Bailey*, 41 N.J. 295 (1963), the Appellate Division considered itself bound by this Court's views on the tolling statute and held N.J.S.A. 2A:14-22 constitutional, reversing the trial court. 168 N.J.Super. 520 (App.Div. 1979). The court also observed that it was "not satisfied as to the correctness of the conclusion reached in *Cohn*" and noted that a later decision by a federal district court, *Hopkins* v. *Kelsey-Hayes, Inc.*, 463 F.Supp. 539 (D.N.J. 1978),[5] had reached the opposite conclusion on the same issue and had held the statute constitutional. 168 N.J. Super. at 526.

---

[4] To that end, Maren had submitted an affidavit of its president outlining the corporation's business in New Jersey between 1969 and 1975. Similarly, Air Conveying presented an affidavit of its president listing sales negotiated and completed in New Jersey between 1969 and 1978. In view of our disposition of this matter, we need not review the trial court's determination of this preliminary issue.

[5] *Cohn* was decided on March 22, 1978. The trial court's orders dismissing plaintiff's complaint against Maren and Air Conveying were entered on June 20 and July 25, 1978, respectively. The *Hopkins* case was decided on December 18, 1978.

Appendix A

Defendants filed notices of appeal as of right;[6] Maren also petitioned this Court for certification, which was granted and merged with the appeals. 82 N.J. 288 (1980). We now affirm.

The effect of N.J.S.A. 2A:14-22 on corporate defendants was left unresolved by the Court in *Lemke* v. *Bailey, supra.* It has been the subject of lower court decisions with conflicting results. Compare *Cohn* v. *G.D. Searle & Co., supra,* with *Hopkins* v. *Kelsey-Hayes, Inc., supra; Whalen* v. *Young,* 28 N.J.Super. 543 (Law Div. 1953), rev'd on other grounds, 15 N.J. 321 (1954) (tolling provision applicable to unrepresented corporate defendant in motor vehicle cases despite availability of substituted service under N.J.S.A. 39:7-2), with *Ferraro* v. *Ferro Trucking Co., Inc.,* 72 N.J.Super. 519 (Law Div. 1962) (same circumstances—tolling provisions inapplicable). A resolution of this conflict first requires analysis of the statute's application to unrepresented foreign corporations that are amenable to long-arm service of process. Finding the provision applicable, we next consider the constitutionality of the statute as applied.

A

The New Jersey tolling statute, N.J.S.A. 2A:14-22, provides:

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom

---

[6] Motions for leave to appeal were also filed but were dismissed since the appealed judgment was final.

there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, *or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which* such person or surety is not residing within this state or *such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time which such an action is required to be commenced by the section.* The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation. [Emphasis supplied]

It is undisputed that neither Maren nor Air Conveying maintained an agent for service of process in New Jersey. A literal reading of the tolling statute's terms would unavoidably lead to the conclusion that the statutory period of limitations never commenced to run on plaintiff's claims. Defendants contend, however, that in light of the expansion of long-arm jurisdiction by state courts over nonresidents, we should construe the statute to provide that the period of limitations is tolled only when a foreign corporation cannot be served anywhere with process from a New Jersey court.

Appendix A

According to defendants the purpose of N.J.S.A. 2A:14-22 is to protect plaintiffs who might otherwise be barred from bringing their actions when certain classes of defendants are involved—essentially defendants who are not subject to the jurisdiction of New Jersey courts. They point to the amendment of the statute in 1949, L. 1949, c. 125, which excluded represented foreign corporations from its tolling effect. This amendment was enacted shortly after a statutory revision that provided acquisition of personal jurisdiction over foreign corporations by personal service within the State on an "officer, director, trustee or a managing or general agent of the corporation * * *." L. 1948, c. 356. Defendants contend that the legislative intent of the two provisions was to compel plaintiffs to institute their actions within the relevant limitations period provided they could obtain jurisdiction over and serve process on defendants. Since under present-day law defendants were amenable to "long-arm" service of process notwithstanding the absence of a representative in New Jersey, see R. 4:4-4(c)(1), defendants claim they are exempt from the tolling provision.

Under the defendants' approach the statutory phrase in N.J.S.A. 2A:14-22—"not represented in this state by any person or officer upon whom summons or other original process may be served"—would be interpreted as though it simply said, "not amenable to service." Thus, a standard involving representation would be transformed into one involving amenability to service. Because neither legislative history nor subsequent developments support this result, we reject defendants' argument and conclude that unrepresented, foreign corporations subject to long-arm service are not exempt from N.J.S.A. 2A:14-22.

Claims similar to defendants' were raised and rejected in *Lemke* v. *Bailey, supra.* In that case plaintiffs brought

suit against nonresidents for damages alleged to have resulted from an automobile accident in New Jersey. 41 N.J. at 297. Defendants argued that since they were amenable to service at all times following the accident by service on the New Jersey Director of Motor Vehicles, the tolling statute did not apply to them. The Court held that such amenability to service did not affect the statute's provision for tolling during nonresidence. *Id.* at 303.

While accepting *Lemke* as correctly decided, defendants here argue that the Appellate Division erred in finding *Lemke* controlling on the separate statutory issue now before us. They correctly note that the *Lemke* Court expressly declined to pass on the effect of the tolling provision on corporate defendants. See *id.* at 301. *Lemke* was concerned only with the effect of N.J.S.A. 39:7-2 on the tolling statute's coverage of individual defendants who were absent from the State. That provision made nonresident motorists amenable to substituted service upon New Jersey's Director of Motor Vehicles. Defendants further emphasize that the legislative history of N.J.S.A. 2A:14-22 more directly supported the conclusion that the tolling provision remained applicable despite the availability of substituted service. The Legislature had considered and passed but later recalled a proposed amendment to the statute exempting nonresident motorists subject to substituted service. The Court in *Lemke* held that legislative inaction in the face of judicial constructions confirmed that N.J.S.A. 39:7-2 did not affect the scope of the tolling provision in N.J.S.A. 2A:14-22. See 41 N.J. at 301.

Defendants contend that none of these factors supports an extension of the rationale in *Lemke*. Noting the absence of any legislative activity concerning the tolling stat-

ute's application to corporations, defendants contend that the presence of contradictory judicial determinations involving foreign corporate defendants, see *supra* at —— (slip op. at 6), renders legislative silence ambiguous.

Despite these asserted bases for distinction, we find the approach taken in *Lemke* applies with equal force to the effects of long-arm jurisdiction on the scope of N.J.S.A. 2A:14-22. As noted by the Court in *Lemke*, the origins of N.J.S.A. 2A:14-22 are traceable to 1820. See 41 N.J. at 298. In its original version New Jersey's tolling provision made specific reference to corporations. See Pennington, *Laws of New Jersey*, 1703-1820 at 670 (1821). The statute remained essentially unchanged until 1949, at which time it provided:

> If any person against whom there is or may be a cause of action specified in sections 2:24-1, 2:24-2, 2:24-3, 2:24-5, 2:24-6; 2:24-16 or 2:24-17 of this title is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, the time or times during which such person is not residing within this state shall not be computed as a part of the periods of time within which such actions are required to be commenced by said sections; and the person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said sections, exclusive of such time or times of nonresidence, [R.S. 2:24-7]

In 1949 the tolling statute was amended and for the first time dealt specifically with the corporate defendant. The

amendment exempted from the statute domestic corporations and those foreign corporations maintaining representatives in New Jersey. It thereby extended the benefits of the State's statutes of limitations to those classes of defendants. As amended in 1949, the statute provided as follows:

> If any person against whom there is or may be a cause of action specified in sections 2:24-1, 2:24-2, 2:24-3, 2:24-5, 2:24-6, 2:24-16 or 2:24-17 of this Title is not a resident of this State when such cause of action accrues, or removes from this State after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation not organized under the laws of this State, against whom there is or may be such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person is not residing within this State or such corporation is not so represented within this State shall not be computed as part of the periods of time within which such actions are required to be commenced by said sections; and the person entitled to any such action may commence the same after the accrual of the cause therefor, within the periods of time limited therefor by said sections, exclusive of such time or times of nonresidence or nonrepresentation. [L. 1949, c. 125]

The statement accompanying the bill read as follows:

> Foreign corporations licensed to do business in New Jersey are now deprived by judicial construction of

the benefit of the statute of limitations. The purpose of this bill is to correct that situation. New York State found it necessary to make a similar change in its law in view of recent court decisions.

[*Statement Accompanying Assembly No. 467* (1949)][7]

As noted above, defendants argue that the intent of the 1949 amendment was to exempt from the tolling provisions corporate defendants amenable to service of process. The fact that the words employed by the Legislature do not mirror this intention is not considered conclusive by defendants. They assert that the present reach of a State court's jurisdictional powers could not have been anticipated when the amendement was drafted. As evidence of this, they note that New Jersey's rule for long-arm service was not passed until 1958, R.R. 4:4-4(d) (effective September 3, 1958) (presently R. 4:4-4(c)(1)), and that it was not until 1971 that this Court recognized that the long-arm rule allows out-of-state service to the "uttermost limits permitted by the United States Constitution," *Avdel Corp.* v. *Mecure,* 58 N.J. 264, 268 (1971).

---

[7] At the time of this amendment, New York's tolling statute was Section 19 of the Civil Practice Act, which had been amended in 1943 to include an exception from the tolling statute for individuals or corporations with a designated agent for service of process within New York and for foreign corporations with "one or more officers or other persons in the state on whom a summons for such corporation may be served." 1943 N.Y. Laws, ch. 263. The current version of New York's tolling statute, N.Y. Civ. Prac. Law and Rules §207, specifically provides that it does not apply "while jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to him within the state." 1962 N.Y. Laws, ch. 308, N.Y. Civ. Prac. Law and Rules §207(3) (McKinney 1972).

Defendant's position is unconvincing. It would require us to incorporate into the tolling statute changes in another area of the law which were made after its passage. While courts of other states have construed tolling statutes to be inapplicable to foreign corporations subject to long-arm service, the statutes involved were phrased in terms of "absence" from the state—general language which more readily lends itself to flexible interpretation.[8] See, *e.g.*, *Dedmon* v. *Falls Products, Inc.*, 299 F.2d 173 (5th Cir. 1962) (Alabama law); *Partis* v. *Miller Equipment Co.*, 324 F.Supp. 898 (N.D. Ohio 1970), aff'd, 439 F.2d 262 (6th Cir. 1971); *Phillips* v. *Anchor Hocking Glass Corp.*, 413 P.2d 732 (Ariz. Sup. Ct. 1966); *Lipe* v. *Javelin Tire Co., Inc.*, 536 P.2d 291 (Idaho Sup. Ct. 1975).[9] The New Jersey statute, however, is very narrowly drawn. It speaks not of presence or absence but of *representation* within the State. Such language must be interpreted from the intent of the Legislature in light of circumstances at the time of enactment. 2A Sutherland, *Statutory Construction* §49.02 (4th Ed. 1973); see *Fidelity Deposit Co. of Maryland* v. *Abagnale*, 97 N.J.Super. 132, 143-144 (Law Div. 1967). As defendants themselves recognize, the circum-

---

[8] For this reason, my Brother Sullivan's observation that our holding "places this Court with a minority of jurisdictions," *post* at — (slip op. at 2), is misleading. Our result today differs from those of other courts because of a difference in statutory language, not a defect in reasoning. Without describing and comparing the various tolling statutes that have been interpreted, any reference to "majority" and "minority" rules is meaningless.

[9] In some cases state legislative action has made clear that tolling shall not occur when a defendant is amenable to service outside the state. See, *e.g.*, Ill. Ann. Rev. Stat. ch. 83 §19 (Smith-Hurd 1979); N.Y. Civ. Prac. Law and Rules §207 (McKinney 1972).

stances prevailing at the time of the 1949 amendment did not include long-arm service on foreign corporations. *We cannot accept the invitation to adopt this latter development as the premise for ignoring clear and unambiguous statutory language.*

Defendant Air Conveying argues in the alternative that New Jersey's long-arm rule created a new class of corporate defendants not covered by N.J.S.A. 2A:14-22. There is no merit to this contention. The tolling statute originally applied to all foreign corporations. See *Cramer* v. *Borden's Farm Products Co., Inc.*, 58 F.2d 1028 (S.D.N.Y. 1932) (under New Jersey law New York corporation licensed to do business in New Jersey not resident of New Jersey and therefore is within the scope of tolling statute). It was not until 1949 that any foreign corporations became exempt from its effects. See *Statement Accompanying Assembly No. 52* (1948). By design, therefore, the statute includes all corporations not specifically exempted by amendment. In effect, Air Conveying argues that a Rule of Court can act as an implied, partial repeal of a legislative enactment. This is beyond the power of the Judiciary. See *New Jersey Chamber of Commerce* v. *New Jersey Election Law Enforcement Commission*, 82 N.J. 57, 82 (1980).

It is significant to note that the 1949 amendment was enacted four years after the landmark case of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). There the United States Supreme Court held that a state's jurisdictional powers extended beyond its borders to reach parties who have had "certain minimum contacts" with the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463

(1940)). The Legislature must be presumed to have been aware of this development when it acted to remove only represented corporations from the tolling provisions of N.J.S.A. 2A:14-22. In the absence of legislative action expressly incorporating amenability to long-arm service as an exemption from the tolling statute, that class of foreign corporations remains subject to its effect.[10]

This conclusion is in accord with the results we have reached in developing a *"common law of limitations." Galligan* v. *Westfield Centre Service, Inc.*, 82 N.J. 188, 191 (1980). We have consistently endeavored, where in keeping with the underlying purposes of statutes of limitations, to preserve a plaintiff's opportunity to have his claim adjudicated on the merits. See, *e.g., Galligan*, 82 N.J. at 193; *Kaczmarek* v. *New Jersey Turnpike Auth.*, 77 N.J. 329, 338 (1978); *White* v. *Violent Crimes Compensation Board*, 76 N.J. 368, 379 (1978). In this case defendant argues that denying plaintiff such an opportunity is consonant with the underlying purposes of the tolling statute.

---

[10] We note that whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State. Contrary to defendants' and our Brother Sullivan's contentions, see *post* at — (slip op. at 1-2), the length of a defendant's exposure to suit without such an agent will not be determined solely by a plaintiff's convenience. If a plaintiff's delay is *inexcusable* and has resulted in *prejudice* to the defendant, the latter may raise the equitable defense of *laches* to bar the claim. See *West Jersey Title & Guaranty Co.* v. *Industrial Trust Co.*, 27 N.J. 144 (1958); *Pavlicka* v. *Pavlicka*, 84 N.J. Super, 357 (App.Div. 1964); *Pfeffer* v. *Delran Tp.*, 159 N.J. Super. 497 (Law Div. 1978). Since this appeal comes to us after a grant of summary judgment, we have no opportunity to assess the merits of that defense here.

Not only do defendants misconstrue those purposes, but the approach they advocate is contrary to the "'just accommodation' of individual justice and public policy," *Galligan*, 82 N.J. at 192-193 (quoting *Lopez* v. *Swyer*, 62 N.J. 267, 274 (1973)), which seeks to avoid "obvious and unnecessary harm [to] individual plaintiffs." *Id.* at 192; see, *e.g.*, *Fox* v. *Passaic General Hosp.*, 71 N.J. 122, 125-126 (1976); *Kyle* v. *Green Acres at Verona, Inc.*, 44 N.J. 100, 109 (1965).[11]

B

Turning to defendants' constitutional claims, we find them similarly unpersuasive.[12]

---

[11] Our Brother Sullivan's reliance on *Galligan* and *White* is therefore misplaced. Neither case dealt with the tolling provision at issue here. In rejecting the "harsh approach of literally applying the statute of limitations," *Galligan*, 82 N.J. at 192 (quoting *Kyle*, 44 N.J. at 109), the Court in those cases avoided the infliction of unnecessary harm on plaintiffs. See *Galligan*, 82 N.J. at 192-193; *White*, 76 N.J. at 379. We do the same here by refusing to deny plaintiffs the benefit of a *tolling* statute to which they are clearly entitled. Justice Sullivan's approach would have us avoid rigid language for the purpose of barring plaintiff's assertion of his claim—a result directly contrary to that reached in *Galligan* and *White*, which the dissent has cited for its support. *Post* at — (slip op. at 3).

[12] Defendants base their claims of unconstitutionality on the Fourteenth Amendment to the Federal Constitution. We note, however, that our analysis would be identical if the challenges had been based on State constitutional grounds. See *Taxpayer's Ass'n of Weymouth Tp.* v. *Weymouth Tp.*, 80 N.J. 6, 42-44 (1976), app. dism. and *cert.* den. *sub nom. Feldman* v. *Weymouth Tp.*, 430 U.S. 977 (1977).

Appendix A

Equal Protection

Defendants do not contend that the classification employed in N.J.S.A. 2A:14-22 implicates any fundamental interest or "suspect class." Rather they assert that a distinction between foreign corporations represented within the State and those unrepresented but amenable to long-arm service lacks any rational relation to the governmental objective sought to be advanced by the tolling statute. Their argument is that the continued expansion of extra-territorial jurisdiction has undermined the rationality of distinguishing between foreign corporations represented in New Jersey and unrepresented foreign corporations that are amenable to long-arm service outside the State. Defendants therefore challenge as irrational the tolling statute's application to the latter.

The Court in *Lemke* rejected a similar constitutional challenge to the statute's distinction between resident and non-resident motorists. See 41 N.J. at 302-303. Although the issue there decided is not identical to that now before us, the principles on which the Court relied continue to provide the proper framework for analysis.[13] They support a finding of constitutionality.

Legislative enactments are presumed to be valid and the burden on the proponent of invalidity is a heavy one. *E.g.*,

---

[13] Defendants again attempt to negate the precedential value of the *Lemke* case. They reiterate the distinctions discussed *supra* at — (slip op. at 10-11), and rely heavily on the fact that defendants in *Lemke* conceded there was a rational basis for establishing resident and nonresident classes. See 41 N.J. at 302. We agree with Appellate Division that such an admission is "hardly any basis for detracting from the court's decision that the application of the tolling statute was constitutional." 168 N.J. Super. at 526.

Hutton Park Gardens v. *West Orange Town Council*, 68 N.J. 543, 564-565 (1975). The challenger must demonstrate that the classification lacks a rational basis in relation to the object of the legislation. *E.g., Dome Realty, Inc.* v. *City of Paterson*, 83 N.J. 212, 243 (1980) (slip op. at 43); *State* v. *CIB Int'l*, 83 N.J. 262, 274-275 (1980) (slip op. at 15); *Salorio* v. *Glaser*, 82 N.J. 482, 516 (1980) (slip op. at 40); *Taxpayers' Ass'n of Weymouth Tp.* v. *Weymouth Tp.*, 80 N.J. 6, 40 (1976), app. dism. and *cert.* den. *sub nom. Feldman* v. *Weymouth Tp.*, 430 U.S. 977 (1977). Even if the original, stated purpose of an enactment refers to conditions that no longer exist, a classification survives this minimal constitutional scrutiny as long as it possesses a conceivable rational basis in present-day circumstances. *McKenney* v. *Byrne*, 82 N.J. 304, 317-318 (1980).

The flaw in defendants' argument is that it recognizes as rational only a distinction based on the impossibility of obtaining jurisdiction over a foreign corporation. It refuses to acknowledge that among amenable foreign corporations there are degrees of difficulty in effecting service. *A recognition of these degrees of difficulty supplies a present rational basis for distinguishing between represented corporations and those unrepresented but amenable to long-arm service.*

The purpose of the statute is not confined to providing relief when service is impossible. Even where absent residents could be served outside the State, the statute still provides for tolling. See *Fidelity Deposit Co. of Maryland* v. *Abagnale*, 97 N.J.Super. at 143-144. There is a conceivable rational basis to support tolling.

> [T]he view might have prevailed that the facility of extra-territorial service did not meet the hardship

> of locating a departed resident in the sprawling country beyond New Jersey's borders. [Id. at 144]

In the 1949 amendment, the Legislature re-expressed its purpose with regard to corporations. It withdrew some of the protection it had afforded plaintiffs suing foreign corporations. Corporations represented in New Jersey, like New Jersey residents present within the State, were made exempt from the statute's tolling effects. However, plaintiffs were still not required to search for defendants outside the jurisdiction and succeed within a definite period of time. Thus, the amendment struck a balance between protecting plaintiffs with claims against foreign corporate defendants and imposing excessive exposure to suit upon those defendants that were represented within the State. We agree with plaintiffs that the availability of long-arm service has not destroyed the rationality of the classification used in striking this balance.

As the Appellate Division correctly observed, the reasonable basis for the distinction "is demonstrated merely by a reading of our rules pertaining to service of process," 168 N.J.Super. at 527. Rule 4:4-4(c)(1) provides that service may be made

> [u]pon a domestic or foreign corporation, by serving, • • • either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place

> of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. *If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing* and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office. [R. 4:4-4(c)(1) (emphasis added)]

Under our rules, extra-territorial service is not simply an alternative to service within the State. Plaintiffs may not resort to out-of-state service unless proper efforts to effect service in New Jersey have failed. The rule imposes a further burden on a plaintiff by requiring him to gather sufficient information to satisfy a court that service is "consistent with due process of law." Since long-arm service is more burdensome than service within the State, a rational distinction exists between corporations that are amenable to service within the State and those that are not. This distinction supports the tolling statute's application to corporations which cannot be served with process within New Jersey. Accordingly, the statute passes constitutional muster.

Due Process

For the first time on appeal defendant Maren also claims that the statute violates the Federal Due Process Clause.

Appendix A

The same obstacles which defendants failed to overcome in asserting their equal protection claim block their path here as well.

The constitutional guarantee of substantive due process requires only that the operation of a statute not be unreasonable, arbitrary or capricious, and that the means selected bear a rational relationship to a permissible legislative purpose. *Dome Realty, Inc.* v. *City of Paterson*, 83 N.J. at 235 (slip op. at 30); *Orange Taxpayers Council, Inc.* v. *City of Orange*, 83 N.J. 246, 256 (1980) (slip op. at 12-13); *Weymouth*, 80 N.J. at 44.

In this case defendants' due process claim is "little more than a restatement of the contention that [the statute] contravene[s] principles of equal protection." *Weymouth*, 80 N.J. at 45. In providing for tolling of the statute of limitations under certain circumstances—absence of a resident, nonresidence in the case of an individual and nonrepresentation in the case of a corporation—the statute is substantially tailored to protect a plaintiff's cause of action when service of process on a defendant is most likely to present difficulties.

Conclusion

For the foregoing reasons the judgment of the Appellate Division is affirmed.

Chief Justice Wilentz and Associates Justices Clifford, Schreiber and Pollock join in this opinion.

Justice Sullivan has filed a separate dissenting opinion in which Justice Handler joins.

Appendix A

SUPREME COURT OF NEW JERSEY

A-72/143 SEPTEMBER TERM 1979

KONSTANTINOS VELMOHOS, also known as VELMOHOS KONSTANTINOS,

Plaintiff-Respondent

v.

MAREN ENGINEERING CORPORATION, an Illinois corporation, and AIR CONVEYING, INC., an Illinois corporation,

Defendants-Appellants,

and

NADUSTCO, INC., a Louisiana corporation,

Defendant.

SULLIVAN, J., dissenting.

I would construe N.J.S.A. 2A:14-22 to toll the statute of limitations as to a foreign corporation against which there is a cause of action in this State only in a situation where such corporation is not amenable to personal jurisdiction.

Defendant corporations were subject to long-arm jurisdiction in this State at all relevant times as found by the trial court. See R. 4:4-4(c)(1). Indeed, service was made upon them pursuant to the rule. To hold that despite this,

a plaintiff can sit back for any number of years and file suit at his pleasure against such foreign corporations, is to do violence to the concept of limitations of actions. The construction placed upon N.J.S.A. 2A:14-22 by the majority opinion, while following the literal language of the statute, frustrates the very purpose of the tolling provision and places this Court with a minority of jurisdictions. See Annotation, "*Tolling of statute of limitations during absence from state as affected by fact that party claiming benefit or limitations remained subject to service during absence of nonresidence*," 55 A.L.R. 3d 1158 (1974). As noted in the annotation, a majority of courts have refused to give application to tolling provisions when the party claiming the benefit of limitations has remained amenable to personal jurisdiction.

A recent comment in 10 *Seton Hall L. Rev.* 585 (1980) entitled "The Tolling Provision of the Statute of Limitations—a Haven for the Dilatory Plaintiff," makes a critical analysis of N.J.S.A. 2A:14-22 and the position now taken in the majority opinion and rejects it on constructional as well as constitutional grounds. The comment concludes by stating that "[a] statute that servies to placate the dilatory plaintiff while denying an important right to a nonresident defendant is an anomaly in a jurisdiction noted for progressive developments in the law corresponding to the changes in the circumstances to which the law applies." *Id.* at 613. Despite the rigidity of some tolling and limitations statutory provisions, this Court has always construed them to effectuate the true statutory purpose. See, *e.g.*, *Galligan* v. *Westfield Centre Service, Inc.*, 82 N. J. 188 (1980); *White* v. *Violent Crimes Compensation Board*, 76 N. J. 368 (1978). It has not done so today.

Appendix A

Although I find it unnecessary to reach the issue, the statutory construction of N.J.S.A. 2A:14-22 adopted by the majority also raises substantial questions of due process and equal protection of the laws. I would reverse the Appellate Division and reinstate the judgment of the trial court dismissing the complaint.

Justice Handler joins in this dissent.

APPENDIX B

Opinion of the United States District Court
(Filed—December 18, 1978)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION No. 78-1646

ROY HOPKINS,

Plaintiff,

v.

KELSEY-HAYES, INC.,

Defendant.

Appearances:

J. Llewellyn Mathews, Esquire
Apell, Howard and Mathews
P. O. Box 95
Lakehurst Road
Browns Mills, New Jersey 08015
Attorney for Plaintiff

Appendix B

Lee B. Laskin, Esquire
Laskin & Botcheos
36 Tanner Street
Haddonfield, New Jersey 08033
Attorney for Defendant

BROTMAN, District Judge

Defendant in this diversity case moves for summary judgment. Fed. R. Civ. P. 56, on the ground that plaintiff's action is barred by the applicable statute of limitations. Because we find that the running of the statute has been tolled by N.J.S.A. 2A:14-22, we hereby deny the motion.

Plaintiff is a New Jersey resident. Defendant is a foreign corporation, organized under the Delaware corporation laws. Defendant admits at ¶1 of its Answer to the Complaint and in its supplemental brief that it has not filed a certificate to do business or a certificate of authority in New Jersey and indicates that it is not otherwise represented in the State for purposes of service of process.

The suit is one to recover damages for personal injuries allegedly sustained by plaintiff when a tire mounted on a rim manufactured by defendant exploded. This occurred on May 18, 1975 in New Jersey; the suit naming this defendant was filed on April 27, 1978, almost three years after the accident. Normally, the two-year statute of limitations applicable to suits for personal injury would bar the suit, N.J.S.A. 2A:14-2. However, N.J.S.A. 2A:14-22 very explicitly provides for the tolling of such statute of limitations where and so long as "any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state

by any person or officer upon whom summons or other original process may be served." The statute also applies to non-resident individuals or resident individuals outside the state.[1]

Defendant argues that the New Jersey long-arm rule, R.R. 4:4-4 which became effective against corporations in September, 1958, allows the plaintiff to serve defendant by registered mail in Delaware. The defendant therefore contends that the tolling statute should be construed as

---

[1] The full statutory provision reads:

2A:14-22. Nonresidence of person liable

If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

inapplicable to it. The weight of authority is squarely against defendant on this point. The courts have reasoned that the intent of the legislature which enacted the tolling provision many years prior to the adoption of the long-arm rules must be ascertained relative to the circumstances prevailing at the time of the enactment. *Cohn* v. *G. D. Searle & Co.*, 447 F. Supp. 903, 907 (D. N.J. 1978) (corporate defendant); *Fidelity & Deposit Co. of Md.* v. *Abagnale*, 97 N. J. Super. 132, 143 (Law Div. 1967).[2] The courts in both cases construed the tolling statute as applicable in situations where the defendant was subject to service by mail under the long-arm rules.

This tolling statute has been strictly construed by the New Jersey courts in cases involving automobile accidents in New Jersey where the defendants are non-resident motorists. Cases are virtually unanimous in holding that substituted service imposed by statute, through the New Jersey Director of Motor Vehicles, N.J.S.A. 39:7-2, does not entitle the non-resident defendant to the benefit of the statute of limitation. This is true whether the defendant is an individual or a corporation. *Lackovic* v. *New England Paper Tube Co., Inc.*, 127 N. J. Super. 394 (Law Div. 1974) (corporate defendant); *Lemke* v. *Bailey*, 41 N. J. 295, 301 (1963); *Whalen* v. *Young*, 28 N. J. Super. 543 (Law Div. 1953), *rev'd on other grounds*, 15 N. J. 321 (1954) (corporate defendant); *Blackmon* v. *Govern*, 138 F. Supp. 884 (D. N. J. 1956); *Gotheiner* v.

---

[2] Like the district court in *Cohn* which cited the state court holding in *Fidelity*, we perceive no important distinction for our purposes between individual and corporate defendants and will analyze the problem without regard to the type of defendant. *See also, Lackovic* v. *New England Paper and Tube Co., Inc.*, 127 N.J. Super. 394, 397 (Law Div. 1974).

Lenihan, 20 N. J. Misc. 119 (Sup. Ct. 1942). The only holding the other way, *Ferraro* v. *Ferro Trucking Co.*, 72 N. J. Super. 519 (Law Div. 1962), has been discredited. *See Lackovic* v. *New England Paper Tube Co., Inc., supra; Lemke* v. *Bailey, supra.* Thus, even where a non-resident corporation can easily be served by substituted service within New Jersey, the tolling statute applies to deny it the protection of the statute of limitations.

We perceive no relevant distinction for our purposes between the substituted service in non-resident motorist cases and long-arm service by registered mail. Moreover, the New Jersey courts have expressly noted that the rationale of the non-resident motorist cases is equally applicable to the long-arm service situation. In *Guas* v. *Guas*, 146 N. J. Super. 541 (Law Div. 1977), the state court held that a resident individual physically outside New Jersey but continuously amenable to service under the long-arm rule relative to New Jersey-licensed drivers of New Jersey-registered vehicles was still subject to the tolling statute. The court cited *Lemke* v. *Bailey, supra,* a non-resident motorist case, as conclusive support for this result. *Op. cit.* at 547. Similarly, in *Fidelity & Deposit Co. of Md.* v. *Abagnale, supra,* at 144, the state court held that *Lemke* v. *Bailey* governed the situation where a resident who became absent from the state after the accrual of the cause of action was subject to extraterritorial service by mail.

We decline to depart from this line of authority; thus, we refuse to interpret the New Jersey tolling provision to allow this defendant to invoke the statute of limitations defense simply because it is amenable to long-arm service. Our examination of the New Jersey state court authority convinces us that this is the interpretation they would render.

Appendix B

The language of the tolling statute unequivocably requires a representative within the state for service of process, and does not require that a plaintiff resort to service beyond the borders of New Jersey to receive the benefits of the tolling provisions. Furthermore, the tolling statute has been on the law books since 1820, with the amendment relative to corporations enacted in 1949. The long-arm rules applicable to corporations have been in effect since 1958. Surely the New Jersey legislature is aware of the argument advanced by defendants, and it is incumbent upon it to make any change it deems appropriate. *See Lemke* v. *Bailey, supra* at 302. Finally, we note that were we to agree with defendant, the tolling provision would be meaningless with respect to non-resident corporations since the vast majority who commit torts within the state would be amenable to long-arm service. Without more authority, we cannot construe a state statute in a manner rendering it ineffective.

Defendant also argues that this construction of the tolling statute creates an arbitrary and discriminatory classification, in violation of the New Jersey and federal constitutional equal protection guarantees. We reject the argument. In doing so, we note that in the recent case of *Cohn* v. *G. D. Searle & Co., supra,* decided in this district, the court reached an opposite conclusion. We respectfully disagree with the holding of *Cohn.* Although Judge Meanor stated that his analysis was grounded in the equal protection clause and not the due process clause, we perceive his discussion to state a substantive due process holding. The *Cohn* court concluded that in light of amenability to service through the long-arm rules, the distinction between domestic and foreign corporations embodied in the tolling statute "bears no rational rela-

tionship to the object of the tolling statute." *Id.* at 912. We view this as a substitution of the court's judgment on the policies behind the tolling statute for that of the legislature. Indeed, in *Fidelity & Deposit Co. of Md.* v. *Abagnale, supra,* at 144, the New Jersey court saw a reasonable basis for distinguishing between defendants servable in New Jersey and those servable only outside New Jersey:

> ". . . the view mig' t have prevailed that the facility of extra-territorial service did not meet the hardship of locating a departed resident in the sprawling country beyond New Jersey's borders."

In addition, the New Jersey Supreme Court has held that there is no constitutional infirmity under either the state or the federal constitution, in a case where the defendant non-resident motorist was amenable to substituted service within New Jersey. *Lemke* v. *Bailey, supra* at 303. In our case where there are greater hardships associated with service outside the state under a long-arm rule, *a fortiori,* the distinction drawn by the tolling statute is rational and passes constitutional muster.

Having denied the motion based on N.J.S.A. 2A:14-22, there is no need to reach the "discovery rule" issue. The motion for summary judgment is hereby denied.

STANLEY S. BROTMAN
United States District Judge

DATED: December 18, 1978

Office-Supreme Court, U.S.
FILED
JUL 8 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G. D. SEARLE & COMPANY,

Petitioner,

vs.

SUSAN COHN and WALTER COHN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

RAYMOND M. TIERNEY, JR.
MICHAEL P. MURPHY
SHANLEY & FISHER
550 Broad Street
Newark, New Jersey 07102
(201) 643-1220
Attorneys for Petitioner

Of Counsel:

WILLIAM P. RICHMOND
DAVID W. CARPENTER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 329-5400

QUESTION PRESENTED

May a foreign corporation which is not "doing business" in a State but which is amenable to the State's long-arm jurisdiction in a particular case be constitutionally prohibited from asserting the State's statute of limitations merely because it has not registered an agent in the State to accept service of process and thereby consented to the State's exercise of *in personam* jurisdiction over it in *all* cases?

RULE 28.1 STATEMENT

Petitioner, G. D. Searle & Co., has the following subsidiaries and affiliates:

G. D. Searle Inter-American Co., G. D. Searle Far East, Inc., G. D. Searle International Capital Co., Searle Chemicals, Inc., Searle Caribbean, Inc., Searle Cardio-Pulmonary Systems, Inc., Searle Pharmaceuticals, Inc., Searle Met Inc., Searle Food Resources, Inc., SCI Corp., LARO, Inc., Searle Medical Products SA Inc., Akwell Industries, Inc., Briggs Corporation, Searle Medical Products (Canada) Inc., Industrias Apson, S. A. de C.V., Puerto Rico Hospital & Medical Supply Co., Inc., Laboratorio Optico Franklin, S.A., Lentes Franklin, S. A., Lentes Franklin del Centro, S.A., Lentes Franklin de Guadalajara, S.A., Lentes Franklin de Monterrey, S.A., Lentes Franklin de Tampico, S.A., Lentes Franklin de Tijuana, S.A., Vision Center of Puerto Rico, Searle Malaysia, Searle Singapore, G. D. Searle Argentina S.A.C.I., G. D. Searle & Co. of Canada, Ltd., Searle de Venezuela, C.A., G. D. Searle Australia Pty. Ltd., Searle Nominees, Ltd., Searle Nuclear do Brazil-Equipamentos Cientificos Ltda., Searle do Brazil S. A., G. D. Searle (Thailand) Ltd., G. D. Searle International (Hong Kong) Ltd., Marupi-Searle Co., Ltd., Searle Japan K.K., Promotora Ipsa, Searle de Mexico S.A. de C.V., G. D. Searle (New Zealand) Ltd., Laboratoires Searle S.A., Will Ross N. V., G. D. Searle A/S, Svend Andersen Plastik Industri A/S, Gold Cross (Hospital Supplies) Ltd., Gold Cross (Subsidiary Holdings) Ltd., G. D. Searle & Co. Ltd., Searle de Frances S.A., Laboratoires Searle, G. D. Searle GmbH, Searle Medical GmbH, Searle EPE, Searle Iberica S. A., G. D. Searle A. B., Searle S. A., Searle Oy., Searle Norge A/S, Searle Laboratories (Pty.) Ltd., G. D. Searle (South Africa) Pty. Ltd., Searle Bangladesh Ltd., Searle India Ltd., Sarala, Searle Pakistan Ltd., Searle Medical B. V., Van Gulijk Instrumenten B. V., G. D. Searle Unterstutzungskasse GmbH, G. D. Searle (Nederland) B. V., Keip Optiek Haarlem B. V., Kodswald A. G., N. V. Future Optics S. A., Inter Lunet B. V., Brilmij Holding B. V., Brilmij Maatschappij Tot Exploitatie Van Optiekbedrijven B. V., Bexop Exploitatiemaatschappij B. V., Searle & Co., Continental Fisons S. A., Searle Philippines, Texas State Optical, Inc., Laboratil S. A. Industrias Pharmaceuticas, Pearl Vision Center, Ltd., Gould & Hershman (Opticians) Ltd., Gould & Hershman (Opticians) (Northern) Ltd., House of Vision, Ltd., Searle Medical S.A., Searle Zambia, Ltd., Pearle Vision Center Inc., Searle Optical Inc., Will Ross Foundation, Inc., Refrigerants & Chemicals (Queensland) Pty. Ltd., E. & W. T. Williams (Holdings) Pty. Ltd., E. & W. T. Williams (Manufacturing) Pty. Ltd., Refrigerants & Chemicals Pty. Ltd., Capri Pools Pty. Ltd., Keunwha-Searle Limited, Kelsar S. A., G. D. Searle Hamburg GmbH, E. Montlake (Opticians) Ltd., Oedip-Cerem S.A., Oedim S.A., Sedim, S.A., and Cedip GmbH.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
RULE 28.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	11
ARGUMENT	14
Introduction	14
I. The New Jersey Tolling Statute Imposes An Impermissible Burden On Interstate Commerce	18
A. The New Jersey Law Is Per Se Invalid	19
B. The New Jersey Statute Is Invalid Because The Burden Imposed On Interstate Commerce Is Disproportionate To Any Legitimate Local Benefit	22
1. The Burden On Interstate Commerce Is Substantial	22
2. The Local Benefits Are Insufficient To Justify These Burdens	25
II. The New Jersey Statute Violates The Due Process And Equal Protection Clauses Of The Fourteenth Amendment	28
A. The Statute Unconstitutionally Burdens Searle's Rights Under The Due Process Clause	29
B. The Tolling Statute Impermissibly Discriminates Against Foreign Corporations That Are Not "Doing Business" In The State	30
CONCLUSION	35

TABLE OF AUTHORITIES

PAGE

CASES

Allenberg Cotton Co. v. *Pittman*, 419 U.S. 20 (1974) 13, 18, 19, 20, 21

Allied Stores v. *Bowers*, 358 U.S. 522 (1959) .. 31

Aruta v. *Keller*, 134 N.J.Super. 522, 342 A.2d 231 (App. Div. 1975) 27

Austin v. *New Hampshire*, 420 U.S. 656 (1975). 31

Avdel Corp. v. *Mecure*, 58 N.J. 264, 277 A.2d 207 (1971) 16

Burd v. *New Jersey Telephone Co.*, 76 N.J. 284, 386 A.2d 1310 (1978)..... 7

Cooke v. *Yarrington*, 62 N.J. 123, 299 A.2d 400 (1973) 28

Dahnke-Walker Co. v. *Bondurant*, 257 U.S. 282 (1921) 21

Davis v. *Farmer's Co-operative Equity Co.*, 262 U.S. 312 (1923) 20, 24

Dean Milk Co. v. *City of Madison*, 340 U.S. 349 (1951) 26

Eli Lilly & Co. v. *Sav-On-Drugs*, 366 U.S. 276 (1961) 19, 21

Great Atlantic & Pacific Tea Co. v. *Cottrell*, 424 U.S. 366 (1976) 18

Gulf Oil Corp. v. *Gilbert*, 330 U.S. 501 (1947) . 24

Holmberg v. Armbrecht, 327 U.S. 392 (1946) .. 16

Hicklin v. *Orbeck*, 437 U.S. 518 (1978) 31

International Shoe Co. v. *Washington*, 326 U.S. 310 (1945)..... 8, 12, 13, 16, 29

PAGE

International Textbook Co. v. *Pigg*, 217 U.S. 91 (1910) 19
Kassel v. *Consolidated Freightways*, U.S. , 49 L.W. 4328 (March 24, 1981) 19
Litton Industrial Systems, Inc. v. *Kennedy Van Saun Corp.*, 117 N.J.Super. 52, 283 A.2d 551 (Law Div. 1971) 17
Materials Research Corp. v. *Metron*, 64 N.J. 74, 312 A.2d 147 (1973)..... 21, 34
Minnesota v. *Clover Leaf Creamery Co.*, U.S. , 49 L.W. 4111 (Jan. 21, 1981) 18, 31, 33
National Equipment Rental Ltd. v. *Szukhent*, 375 U.S. 311 (1964) 17, 22, 24
Neirbo v. *Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165 (1939)..... 16, 24
Nippert v. *City of Richmond*, 327 U.S. 416 (1946) 19
Pennsylvania Fire Ins. Co. v. *Gold Issue Mining Co.*, 243 U.S. 93 (1917)..... 12, 17, 24
Philadelphia v. *New Jersey*, 437 U.S. 617 (1978). 18
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 13, 18, 19, 22, 26
Raymond Motor Transportation, Inc. v. *Rice*, 434 U.S. 429 (1978) 22
Reed v. *Reed*, 404 U.S. 71 (1971)..... 31
Robbins v. *Shelby County*, 120 U.S. 489 (1887). 19
Royster Guano Co. v. *Virginia*, 253 U.S. 412 (1920) 31
Rush v. *Savchuk*, 444 U.S. 320 (1980)..... 16, 23, 29
Scanapico v. *Richmond F.P.R. Co.*, 439 F.2d 17 (2d Cir. 1970) (en banc) 20, 24, 25
Schweiker v. *Wilson*, U.S. , 49 L.W. 4207 (March 3, 1981) 33
Shaffer v. *Heitner*, 433 U.S. 186 (1977).....13, 16, 23, 30, 31

PAGE

Shapiro v. *Thompson*, 394 U.S. 618 (1969) 31
Sherbert v. *Verner*, 374 U.S. 398 (1963) 29
Sioux Remedy Co. v. *Cope*, 235 U.S. 197 (1914) 13, 19, 20, 21, 23, 24
Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945) 18
Terral v. *Burke Construction Co.*, 257 U.S. 529 (1922) 29
United States Railroad Retirement Board v. *Fritz*, U.S. , 49 L.W. 4035 (Dec. 9, 1980) 33
Velmohos v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980).....10-11, 14, 15, 16, 25, 27
Vlandis v. *Klein*, 412 U.S. 441 (1973) 32
Weinberger v. *Weisenfeld*, 420 U.S. 636 (1975). 33
Western and Southern Life Ins. Co. v. *State Bd. of Equalization*, U.S. , 49 L.W. 4542 (May 26, 1981)..... 29
World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980) 23, 29
Wright v. *Keiser*, 568 P.2d 1262 (Okla. Sup. Ct. 1977) 32

Miscellaneous

Annotation, 55 A.L.R.3d 1158 (1974) 18
New Jersey Ct. R. 1:13-7 ..... 28, 32
4:2-2 ..... 28, 32
4:4-4 4
New Jersey Statutes Annotated, 2A:14-2 ..... 4, 7
2A:14-22 ..... 2, 7, 8
14A:4-1 *et seq.*. 17
14A:13-1 ..... 14, 30
14A:13-2 ..... 2-3, 6, 17, 24
14A:13-3 3
14A:13-4 ..... 3-4, 6, 17, 24

PAGE

Restatement of the Law (Second), Conflict of Laws (1971)
§34, Comment f 17
§42, Comment e 8
§44 17

NO. 80-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G. D. SEARLE & COMPANY,

Petitioner,

vs.

SUSAN COHN and WALTER COHN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 628 F.2d 801 and is reproduced in the Petition for Certiorari (pp. 1a-25a). The judgment of the Court of Appeals appears in the Petition for Certiorari (pp. 26a-27a) and in the Joint Appendix (pp. 74a-75a). The opinion of the United States District Court for the District of New Jersey is reported at 447 F. Supp. 903 and is reproduced in both the Petition for Certiorari (pp. 28a-49a) and in the Joint Appendix (pp. 26a-48a).

JURISDICTION

The judgment of the Third Circuit was entered on July 23, 1980 (Pet. for Cert. 26a-27a). A timely petition for a writ of certiorari was filed on October 20, 1980 and granted on April 20,

1981. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment XIV, §1:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Art. 1, §8, Cl. 3:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states,...."

New Jersey Statutes Annotated, 2A:14-22:

> "If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said section, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation."

New Jersey Statutes Annotated, 14A:13-2:

"* * *

"(2) A foreign corporation which receives a certificate of authority under this act shall, until a certification of revocation or of withdrawal is issued as provided in this act, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, except as in this act otherwise provided, shall be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character. . . ."

New Jersey Statutes Annotated, 14A:13-3:

"(1) No foreign corporation shall have the right to transact business in this State until it shall have procured a certificate of authority so to do from the Secretary of State. A foreign corporation may be authorized to do in this State any business which may be done lawfully in this State by a domestic corporation, to the extent that it is authorized to do such business in the jurisdiction of its incorporation, but no other business. . . ."

New Jersey Statutes Annotated, 14A:13-4:

"(1) To procure a certificate of authority to transact business in this State, a foreign corporation shall file in the office of the Secretary of State an application executed on behalf of the corporation setting forth

"(a) the name of the corporation and the jurisdiction of its incorporation;

"(b) the date of incorporation and the period of duration of the corporation;

"(c) the address of the main business or headquarters office of the corporation;

"(d) the address of the registered office of the corporation in this State, and the name of its registered agent in this State at such address, together with a statement that the registered agent is an agent of the corporation upon whom process against the corporation may be served; and

"(e) the character of the business it is to transact in this State, together with a statement that it is authorized to transact such business in the jurisdiction of its incorporation.

* * *

"(3) Upon the filing of the application, the Secretary of State shall issue to the foreign corporation a certificate of authority to transact business in this State."

New Jersey Court Rule 4:4-4:

"Service of summons, writs and complaints shall be made as follows:

* * *

"(c) Corporations, Partnerships, and Associations.

"(1) Corporations. Upon a domestic or foreign corporation, by serving, in the manner prescribed in paragraph (a), either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office."

New Jersey Statutes Annotated, 2A:14-2:

"Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued."

STATEMENT OF THE CASE

G. D. Searle & Co. Petitioner G. D. Searle & Co. ("Searle") is a Delaware corporation which has its principal place of business in Skokie, Illinois. During the period covered by this case, it was engaged in the business of manufacturing and selling pharmaceutical products.[1]

Searle's products are sold in every State. However, because of the nature of Searle's business, there are many States in which Searle does not have a production facility, a distribution center, or an office and in which Searle is not registered to do business. Searle's products are produced at facilities located at different sites in the United States. Searle's products then are sold to independent wholesalers, hospitals, and clinics who, in turn, distribute the products to retail pharmacies for sale to the ultimate consumers. Searle thus is not itself engaged in either the wholesale distribution or the retail distribution of its products. In those States in which Searle does not have a facility or office, its business activities are limited, first, to shipping its products, through the channels of interstate commerce, to independent wholesalers, hospitals, and clinics and, second, to activities designed to promote use of its products.

Prior to December 30, 1960, Searle transacted business in New Jersey.[2] Thus, Searle had then been required, under the New Jersey statutes that regulates corporations that "transact business" in New Jersey, to file certain reports with the New Jersey Secretary of State, to appoint a registered agent in New Jersey upon whom process against the corporation could be served, and thereby to obtain a "certificate of authority" which, by the terms of the statute, subjected it the "same duties" imposed on domestic cor-

[1]After the period covered by this case, Searle transferred some of these functions to its subsidiaries. For example, since 1978, Enovid, the product at issue in this case, has been manufactured by Searle & Co., a subsidiary located in Puerto Rico.

[2]Although this is not reflected in the record, Searle had had a distribution center and an office in New Jersey during that period.

porations. *See* N.J.S.A. 14A:13-2, 13-4. Searle then made the requisite filings and had a registered agent to accept process.

In 1960, Searle ceased the New Jersey activities that had subjected it to the registration statute, and on December 30, 1960, it terminated its registration in New Jersey (Cert. Pet. 30a). Thereafter, as the District Court found, Searle's activities in New Jersey have been limited to shipping its products from out-of-state locations to independent New Jersey wholesalers, hospitals, or clinics and to promoting its products (Cert. Pet. 35a). In connection with its promotional efforts, Searle has employed a number of "detailmen" who work and in many instances live in New Jersey (Cert. Pet. 30a). The detailmen's function is solely to talk to New Jersey doctors, generate good will for the company, and encourage doctors to prescribe Searle's products (Cert. Pet. 30a). The detailmen have no power to make contracts or place orders (Cert. Pet. 30a). Because Searle has no offices in New Jersey, these detailmen operate out of their homes and they report to officials at Searle's headquarters in Skokie, Illinois (Cert. Pet. 35a).

Although Searle does not engage in intrastate business in New Jersey, it has conceded that it is amenable to long arm jurisdiction in New Jersey courts in personal injury actions involving Searle products that were purchased and used in New Jersey.

The Present Suit. In the present suit, respondents Susan Cohn and her husband[3] claim that Searle is liable for the damages they allegedly suffered as a result of Mrs. Cohn's use of Enovid, an oral contraceptive manufactured by Searle. The Complaint alleges that Mrs. Cohn began using Enovid in approximately June, 1963, that she suffered a stroke on December 22, 1963, and that she and her husband each incurred damages as a result of this stroke.

The suit was filed in New Jersey Superior Court on January 29, 1974, more than *ten years* after Mrs. Cohn's stroke. Respondents

[3]Respondent Walter Cohn is representing both himself *pro se* and his wife in this suit.

obtained jurisdiction over Searle by mailing a copy of the summons and the complaint to Searle's headquarters in Skokie, Illinois, pursuant to New Jersey's long-arm rule. It is undisputed that Searle is subject to *in personam* jurisdiction in New Jersey in this case.

After removing the case to the United States District Court, Searle moved for summary judgment on the ground the suit was barred by the two-year New Jersey statute of limitations that applies to such personal injury suits. *See* N.J.S.A. 2A:14-2. Because New Jersey law provides that a cause of action does not accrue until a plaintiff has reason to know of "the existence of a cause of action" against a particular defendant, *see Burd* v. *New Jersey Telephone Co.*, 76 N.J. 284, 386 A.2d 1310, 1314-15 (1978), Searle acknowledged in the trial court that the two-year statute of limitations may not have begun running on the date of Mrs. Cohn's stroke, December 22, 1963. Searle argued, however—and the District Court later held—that respondents had had reason to know that they had a cause of action against Searle no later than 1970 and that, if applicable, the two year statute of limitations will bar this suit.[4]

Respondents, however, argued that under New Jersey's "tolling statute" (N.J.S.A. 2A:14-22) Searle could not claim the benefit of New Jersey's statute of limitations. This statute provides that where "a corporation . . . not organized under the laws of this State . . . is not represented in [New Jersey] by any person or other officer upon whom process may be served" the statute of

[4]In the trial court, respondents initially argued that, although they had diligently examined the relevant literature, they had not discovered their cause of action against Searle until 1974. However, when pretrial discovery established that they had discovered their cause of action in 1969 or 1970, respondents *conceded* this point (Joint Appendix ("JA") p. 17). Respondents then attempted to avoid the statute of limitations by urging—contrary to their earlier contentions—that Mrs. Cohn had been "insane" prior to 1974. The District Court rejected both of respondents' claims (JA 59, 64).

limitations will not run in any cause of action against that corporation. N.J.S.A. 2A:14-22. Respondents contended that Searle was not "represented" in New Jersey during the relevant period because it had no office or officer in the State and had not designated an agent to accept service of process.

Searle argued that this tolling provision could not be applied to it in the present suit. First, Searle urged that the tolling statute was inapplicable to it as a matter of state law. It argued it was "represented" in New Jersey because it was amenable to personal jurisdiction in New Jersey under New Jersey's long-arm provisions. Searle further pointed out that under the New Jersey rule governing service of process (Rule 4:4-4), service can be made upon "any servant of the corporation within the State acting in the discharge of his duties." Because its New Jersey detailmen were such servants of Searle, it argued it was represented in New Jersey by many persons "upon whom process may be served."[5] Second, in any case, Searle maintained that it would violate the Commerce Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution if a State could deny the benefit of its statute of limitations to foreign corporations that are amenable to *in personam* jurisdiction in that suit merely because the corporation had not consented to jurisdiction in *all* suits in the State by registering an agent in the State to receive process.

The District Court's Decision. The District Court rejected Searle's state law claims that Searle was "represented" in the State (Cert. Pet. 33a-43a). In determining the meaning of "representation," the District Court held that the intent of the legisla-

[5]Of course, like long arm service or like service on an officer of a corporation, service on detailmen would only be effective to subject Searle to *in personam* jurisdiction in New Jersey in those cases in which the "minimum contacts" test is satisfied. *See International Shoe Co.* v. *Washington*, 326 U.S. 310, 317 (1945); Restatement of the Law (Second), Conflict of Laws, §42, Comment e (1971).

ture must be determined in light of the circumstances in existence at the time the tolling statute was enacted in 1949. New Jersey did not then have a long-arm rule, and the only means of serving a foreign corporation was service on an officer, director, or appointed agent. The District Court thus held the New Jersey legislature intended that a foreign corporation that did not have an officer, director, or registered agent in the State would not be treated as "represented" in New Jersey, even though it was subject to long-arm jurisdiction and had other servants in the State who could be served.

However, the District Court held that the tolling provision was unconstitutional. The District Court concluded that the statute violated the Equal Protection Clause because it arbitrarily discriminated against unrepresented foreign corporations that are subject to long-arm jurisdiction. In view of the fact there was no long arm jurisdiction in 1949, the District Court reasoned that the sole purpose of the New Jersey tolling statute, as enacted in 1949, was to preserve a plaintiff's cause of action where the defendant is not amenable to suit in New Jersey. Because unrepresented corporations that are subject to long-arm jurisdiction are now no less amenable to process than are domestic corporations or registered foreign corporations, the Court concluded that discrimination against such unregistered foreign corporations is irrational (Cert. Pet. 44a–49a).

The District Court further concluded that the State could not, under the Commerce Clause, deny valuable rights like the protection of the statute of limitations to foreign corporations engaged in interstate commerce simply because they had not appointed an agent in the State to accept service of process (Pet. for Cert. 44a-45a n.17). The Court thus rejected respondents' argument that the statute legitimately furthered a proper legislative purpose of forcing all foreign corporations to register in New Jersey. Quite apart from the fact it held such an objective would be unconstitutional,

the Court stated it found no evidence that the statute had any such purpose.

The Court of Appeals Decision. Respondents appealed the dismissal of the suit to the Court of Appeals for the Third Circuit. Before the Third Circuit rendered its decision, the New Jersey Supreme Court issued a decision that addressed many of the points that had been raised. *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980). In reliance on this decision, the Court of Appeals reversed the District Court.

The Court of Appeals held that a foreign corporation is not "represented" in New Jersey, even though it is subject to long arm jurisdiction because the New Jersey Supreme Court had expressly rejected this argument in *Velmohos*. The Court of Appeals further held that Searle is not "represented" in New Jersey within the meaning of the tolling statute even though it had servants in the state upon whom service could be made. Like the District Court, the Court of Appeals determined the legislative intent on the basis of circumstances in existence in 1949. Because service on detailmen was not permitted in 1949, the Court of Appeals held their presence in New Jersey did not constitute "representation" under the tolling statute (Cert. Pet. 15a-17a).

Second, the Court of Appeals held the tolling statute is constitutional because it concluded the statute furthers legitimate state objectives (Cert. Pet. pp. 18a-25a). Although there had been no long-arm rule in New Jersey in 1949, the Court concluded that the tolling provision had the "legitimate objective" of forcing foreign corporations to appoint agents in New Jersey and thereby making it easier for plaintiffs prosecuting suits in New Jersey courts to obtain jurisdiction than if they were able to rely solely upon long-arm jurisdiction.

Specifically, the Court of Appeals noted that the New Jersey Supreme Court, in *Velmohos*, had identified three reasons why long-arm service is "more difficult and time consuming to achieve

than service within the State" and why the tolling statute will have the effect of simplifying a plaintiff's task (Cert. Pet. 21a-23a). First, under the New Jersey long-arm rule, "extra territorial service is not simply an alternative to service in the State" because plaintiffs may only resort to such service if they first ascertain that service cannot be made in the State. Second, a plaintiff who resorts to long-arm service has the burden of gathering sufficient information to satisfy a court that the long-arm jurisdiction is consistent with due process. Third, there may be cases in which unrepresented foreign corporations are more "difficult to locate" than represented corporations or domestic corporations. *See also Velmohos, supra*, 416 A.2d at 380-81. The Court of Appeals concluded that the State's interest in protecting a plaintiff against any possible difficulty in locating and obtaining personal jurisdiction in New Jersey over a foreign corporation was sufficient to satisfy the Due Process and Equal Protection Clauses. The Court of Appeals did not specifically address Searle's Commerce Clause claim.

A timely petition for a writ of certiorari to review the Court of Appeals' decision was filed on October 20, 1980. This petition was granted on April 20, 1981.

SUMMARY OF ARGUMENT

The New Jersey tolling statute bars unregistered foreign corporations from raising the bar of the statute of limitations even where, as here, the corporation was at all relevant times amenable to long-arm jurisdiction. The effect of this statute is to require foreign corporations, like Searle, that are not "doing business" in New Jersey to waive one of two substantial rights.

On the one hand, if the corporation refuses to register an agent to accept service of process in New Jersey, the corporation will be forever denied the right to plead the statute of limitations that applies to all other defendants. In cases in which Searle is amenable to suit in New Jersey, an action could then be brought against

it at any time, subject only to the convenience, whim, or caprice of the plaintiff.

On the other hand, if the foreign corporation wants to obtain the protection and certainty of the statute of limitations, the corporation will have to register an agent. By so doing, the corporation would be consenting to jurisdiction and venue in New Jersey in any and all suits, including "foreign" causes of action that have no relation to New Jersey and that would not satisfy the "minimum contacts" test of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny. *See Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U.S. 93 (1917). Furthermore, the only way a corporation may, under New Jersey law, register an agent in New Jersey is to qualify to do business in New Jersey, subject itself to duties that apply to domestic New Jersey corporations, and thereby waive its immunity from state licensing restrictions.

To avoid these severe burdens, nearly every state has held, as a matter of state law, that comparable tolling statutes are inapplicable to foreign corporations that are amenable to long-arm jurisdiction. By refusing to follow these decisions, New Jersey has violated Searle's constitutional rights.

First, the New Jersey tolling statute violates the Commerce Clause. Searle's activities in New Jersey are limited to shipping its products, through interstate commerce, to independent middlemen located in the state and to sending "drummers" into the state to encourage doctors to prescribe its products. This Court has repeatedly held that such interstate enterprises are *per se* immune from general police power regulations. States may not require these foreign corporations to register agents or qualify to do business. Nor may they deny these corporations important state rights in litigation merely because they have failed to comply with such requirements. *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197 (1914); *see Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974).

In any event, the New Jersey tolling statute is invalid under the Commerce Clause because the burden on interstate commerce is clearly excessive in relation to the local benefits. *See Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). To the extent it advances any legitimate local interests, these could plainly be achieved by means that would have a lesser burden on commerce.

The state interest in sparing plaintiffs the burden of proving that particular suits against foreign corporations in New Jersey are consistent with the Due Process Clause has been held to be *per se* illegitimate. *See Shaffer* v. *Heitner*, 433 U.S. 186, 211 (1977). The state interest in simplifying service of process for plaintiffs is too minor to justify the burden on commerce. In any case, it can be achieved directly, without interfering with interstate commerce. Finally, the interest in protecting plaintiffs who cannot locate out of state defendants can readily be achieved by alternative means: a narrowly drawn statute that prevents the statute of limitations from running only when the defendant cannot be found.

Second, the New Jersey statute violates the Due Process Clause. It requires foreign corporations to forego the benefit of the statute of limitations unless they waive their right, under the Due Process Clause, not to be sued in New Jersey in cases in which the "minimum contacts" test of *International Shoe* cannot be satisfied. None of the putative objectives of the New Jersey law are possibly sufficient to justify this unconstitutional condition.

Finally, the statute violates the Equal Protection Clause. It singles out foreign corporations that do not do business in New Jersey and subjects them to a unique burden. Because this statute burdens fundamental constitutional rights and applies only to entities that could not be represented in the New Jersey legislature, it must satisfy a heightened standard of review to be constitutional. Here, none of the three objectives that have been identified for the statute are sufficient to justify the discrimination against

unregistered foreign corporations, like Searle, that are amenable to suit in New Jersey—under *any* standard of review. Indeed, if the purpose of the statute is to protect plaintiffs against the difficulties of making extraterritorial service, the statute is irrational on its face because it tolls the statute of limitations *indefinitely*, even when no difficulties are encountered by the plaintiff. Moreover, the sole actual purpose of the New Jersey legislature that enacted the law was to preserve a plaintiff's cause of action when the defendant could not be sued in New Jersey. Because Searle was here amenable to suit in New Jersey at all relevant times, the discrimination against it does not serve *any* purpose.

ARGUMENT

Introduction

Like most States, New Jersey has long had a statute that tolls the statute of limitations during any period in which the defendant to a cause of action did not reside in the State. It also has long had a statute that requires corporations that "transact business" in New Jersey to register in the State, to assume duties of domestic corporations, and to appoint agents to accept service of process in any suit brought in a New Jersey court. *See* N.J.S.A. 14A: 13-1, *et seq.*

The original version of the New Jersey tolling statute[6] appears, by its terms, to have denied the benefit of the statute of limitations to all corporations not chartered by the State of New Jersey, even including those registered to do business there.[7] *See Velmohos* v. *Maren Engineering Corp.*, *supra*, 416 A.2d at 376-77. In 1949,

[6]Prior to 1949 the statute simply provided that the statute of limitations would never run against "any person" who "is not a resident of" New Jersey, without making any specific reference to corporations. *Velmohos*, *supra*, 216 A.2d at 376.

[7]Although the original version of the statute is not in issue, it appears that its application to a foreign corporation would have been a flagrant violation of the Equal Protection Clause and the Commerce Clause.

the New Jersey legislature enacted the present version of the tolling statute. It extends the benefit of the statute of limitations to corporations that are "not organized" in New Jersey but that are "represented in this State by any person or officer upon whom summons or any other original process may be served." The only available legislative history is a statement accompanying this 1949 amendment which indicates that the statute was intended to benefit those foreign corporations that are "licensed to do business in New Jersey." *See Velmohos* v. *Maren Engineering Corp.*, *supra*, 416 A.2d at 377, *quoting* Statement Accompanying New Jersey Assembly Bill No. 467 (1949).

The New Jersey tolling statute, as amended in 1949, created some potential for the imposition of unique burdens on foreign corporations that did not "transact business" in New Jersey. In 1949, however, there were few, if any, instances in which such burdens could in practice have been imposed. The critical fact is that New Jersey did not then have a long-arm statute or any other provision for the assertion of *in personam* jurisdiction over an unregistered foreign corporation. There thus was then no basis for a New Jersey court to obtain the jurisdiction that would allow it to apply the tolling statute to the prejudice of such interstate corporations, and there was little risk that a foreign corporation could ever be so burdened.

However, in 1958, the New Jersey Supreme Court promulgated a rule that authorizes long-arm jurisdiction to the "uttermost limits permitted by the United States Constitution." *Avdel Corp.* v. *Mecure*, 58 N.J. 264, 268, 277 A.2d 207, 209 (1971). This rule indisputably affords New Jersey courts *in personam* jurisdiction over foreign corporations, like Searle, where the corporation's activities in interstate commerce and the litigation are sufficiently related to New Jersey to satisfy the "minimum contacts" test of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny.

The adoption of the New Jersey long-arm rule and the *Velmohos* holding that unregistered foreign corporations may never claim the benefit of the New Jersey statute of limitations impose a serious burden on companies that do not have facilities or offices in New Jersey but that will be amenable to long-arm jurisdiction in particular cases. In effect, the tolling statute requires them to relinquish one of two substantial rights. First, if the corporation declines to register an agent in New Jersey, it will be totally denied the right to claim the protection of the statute of limitations applicable to all other defendants. If it is amenable to long-arm jurisdiction in New Jersey in a case, it will therefore be subject to suit in New Jersey anytime.[8]

Second, if the corporation submits to the State's coercion and registers an agent, the corporation will waive substantial rights under the Due Process and Commerce Clauses. Although the appointment of an agent will not affect Searle's amenability to suit where, as in this case, long-arm jurisdiction can constitutionally be exercised, there are a great many suits in which there would be no relationship between "the forum and the litigation" and in which, because Searle has almost no relationship with New Jersey, personal jurisdiction could not be exercised over it there. *Compare Rush* v. *Shavchuk*, 444 U.S. 320, 327, 329 (1980); *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977). But by registering an agent to accept process, Searle would be consenting to *in personam* jurisdiction and venue in New Jersey Courts in *all* cases, including those in which jurisdiction could not otherwise be exercised. *See Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U.S. 93 (1917) (appointment of agent in a state constitutes consent to jurisdiction in foreign causes of action); *Neirbo* v. *Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165 (1939) (appoint-

[8]Although a defendant could attempt to dismiss some such suits under the doctrine of laches, *see Velmohos*, *supra* 416 A.2d at 378 n.10, this doctrine does not even begin to provide the certainty and protection from suit that the statute of limitations affords. *cf. Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946).

ment of agent waives objections to venue); *see also National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311 (1964); *Litton Industrial Systems, Inc.* v. *Kennedy Van Saun Corp.*, 117 N.J. Super. 52, 283 A.2d 551, 555-56 (Law Div. 1971); Restatement of Conflicts of Laws (Second), §34, Comment f (1971); *id.*, §44.[9]

Further, New Jersey law does not contain any provision that permits a foreign corporation to register an agent to accept service of process in New Jersey, without also qualifying the corporation to do business in the State. Thus, the only way Searle can register an agent is to obtain a "certificate of authority to transact business" in New Jersey. *See* N.J.S.A. 14A:4-1 *et. seq; id.*, 13-4. By qualifying to do business, Searle would subject itself to requirements of annual reporting of business activities, franchise tax liability, and, by the terms of the statute, "to the same duties, restrictions, penalties, and liabilities . . . imposed on domestic corporations." N.J.S.A. 14A:13-2. In short, Searle would thus also have to waive its right not to be treated as a domestic New Jersey corporation to obtain the benefit of its statute of limitations.

Because of these extreme burdens and anomalies, nearly every other State court has held, as a matter of state law, that comparable tolling statutes are inapplicable where, as here, the absent defendant was amenable to suit in the state at all relevant times.[10]

---

[9] In New Jersey, the designation of an agent to accept service of process constitutes a foreign corporation's consent to jurisdiction in New Jersey in all cases, including ones that are unrelated to New Jersey. As the court stated in *Litton Industrial Systems, Inc.* v. *Kennedy Van Saun Corp.*, *supra*, designation of an agent is consent to suit in New Jersey, "even if it be established that the contract . . . sued on was unrelated to defendant's business activities in [this] state." *See* 283 A.2d at 555-56. This follows, *inter alia*, from the fact that a corporation that registers in New Jersey thereby assumes, under the terms of the statute, the "same duties" imposed on corporations that are incorporated in New Jersey. *See* N.J.S.A. 14A:13-2.

[10] As the District Court recognized, of the approximately forty-two state courts that have considered the issue whether their tolling statutes

(Footnote continued on following page.)

These holdings avoided serious constitutional questions. However, because New Jersey has refused to follow these decisions, the constitutional questions are squarely presented. Searle submits that the New Jersey tolling statute is, as applied to it, invalid under the Commerce Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution.

I. The New Jersey Tolling Statute Imposes An Impermissible Burden On Interstate Commerce.

The Commerce Clause creates, by its own force, "an area of trade free from interference by the States" and stands as "a limitation upon the power of the States." *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-71 (1976); *see Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767 (1945). The criteria for assessing the validity of State legislation under the Commerce Clause are well established. First, there are certain state statutes that impose burdens on interstate commerce that are so substantial, direct, or unjustified that this Court has applied a virtual *per se* rule of invalidity. *See Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974). Second, even if a State law regulates "even-handedly" and imposes only indirect, incidental burdens on interstate commerce, the law will be invalid if the "burden imposed on interstate commerce is clearly excessive in relation to the putative local benefit." *Pike* v. *Bruce Church, Inc.*, *supra*, 397 U.S. at 142; *see also Minnesota* v. *Clover Leaf Creamery Co.*, ___ U.S. ___, 49 L.W. 4111, 4115 (Jan. 21, 1981). In such cases, "if a legitimate local purpose is found, then the question is one of degree. . . . The extent of the burden that will be tolerated" then depends "on the nature of the local interest involved, and on whether it could be promoted

---

(Footnote continued from previous page.)
are inapplicable to claims against nonresidents who have continuously been amenable to long arm jurisdiction, thirty eight have rejected the position of the New Jersey Supreme Court. Cert. Pet. 49a n.21. *See* JA pp. 18a-25a; Annotation, 55 A.L.R.3d 1158 (1974).

as well with a lesser impact on interstate activities." *Pike, supra* 397 U.S. at 142; *Accord, Kassel* v. *Consolidated Freightways*, ___ U.S. ___, 49 L.W. 4328, 4330 (March 24, 1981). The New Jersey tolling statute is invalid under both these lines of Commerce Clause decisions.

A. The New Jersey Law Is Per Se Invalid.

It has been settled for nearly a century that it is a *per se* violation of the Commerce Clause for a State to apply general legislative restrictions to enterprises whose sole activities within the State's borders have consisted of sending representatives to "drum up" business and of shipping goods through the channels of interstate commerce directly to purchasers located in the State. *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197 (1914); *International Textbook Co.* v. *Pigg*, 217 U.S. 91 (1910); *see Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974); *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946); *Robbins* v. *Shelby County*, 120 U.S. 489 (1887). These decisions recognize that the zone of free trade established by the Commerce Clause would be a meaningless abstraction if a State could impose obligations of domestic corporations on enterprises merely because they engaged in the State in incidental activities that are integral to interstate commerce. Enterprises have a right to structure their businesses and immunize themselves from burdensome local legislative restrictions. Indeed, this Court has thus stated that it is clear "under the authority of the so-called 'drummer cases,' [that a pharmaceutical company] is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State." *Eli Lilly & Co.* v. *Sav-On Drugs*, 366 U.S. 276, 278-79 (1961) (citations omitted). The corollary to these principles is that states may not deny such foreign corporations important rights in litigation merely because they have failed to comply with such regulations.

In *Sioux Remedy Co.* v. *Cope*, *supra*, for example, a South Dakota statute had denied the right to file suits in South Dakota

courts to foreign corporations that had not complied with a statute requiring the appointment of resident agents to accept service of process and the registration of the corporation. This Court held that the statute could not constitutionally be applied to bar an Iowa corporation that had shipped goods to a South Dakota purchaser from bringing suit in a South Dakota court. Because the corporation's activities fell within the constitutional zone of free trade, this Court held the State could not "obstruct or hamper" the corporation in the "legitimate purpose of [interstate] commerce" of attempting to take advantage of the same rights to litigate in the courts of the state as are available to all other litigants. 235 U.S. at 204. In so holding, this Court further emphasized the severe burdens the South Dakota statute imposed. Not only did this Court recognize the serious risk to free trade inherent in a requirement that such a corporation be licensed, but it also held that the rule that conditioned a corporation's right to sue on the appointment of a resident agent was "particularly burdensome" and could subject corporations engaged in interstate commerce to "serious hazards." *Id.*, at 205.

> "[I]t requires the corporation to subject itself to suit to the jurisdiction of the courts of the State in general as a prerequisite to suing in any of them; . . . it withholds the right to sue even in a single instance *until the corporation renders itself amenable to suit in all the courts of the State by whosoever chooses to sue it there.*" 235 U.S. at 205 (emphasis added).[11]

Allenberg Cotton Co. v. *Pittman*, 419 U.S. 20 (1974), is a more recent application of these principles. There this Court followed the reasoning of *Sioux Remedy* and held that Mississippi could not deny the right to sue in state court to a foreign corporation

[11] *Sioux Remedy* is one of the many decisions that recognize that an interstate enterprise's interest in being subjected to suit only in appropriate forums is protected by the Commerce Clause as well as by the Due Process Clause. *See, e.g., Davis* v. *Farmer's Co-operative Equity Co.*, 262 U.S. 312, 317-18 (1923); *Scanapico* v. *Richmond F.P.R. Co.*, 439 F.2d 17, 25-28 (2nd Cir. 1970) (en banc).

that purchased cotton in Mississippi exclusively for sale in interstate commerce merely because the corporation had not qualified to do business in Mississippi. *Accord, Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282 (1921).

The application of these principles to the present case is clear. First, Searle's activities in New Jersey unquestionably fall within the zone of free trade that is immune from general police power restrictions. Searle has no facility or office in New Jersey. Its detailmen, who work out of their homes and report to Searle's Skokie office, are engaged in strictly promotional activities in New Jersey and are not empowered to enter into contracts or to take orders. The balance of Searle's New Jersey related activities consists of shipping its products from out of State, through the channels of interstate commerce, directly to independent wholesalers, hospitals, and clinics located in New Jersey.[12] Indeed, the present case is far clearer on this point than was *Allenberg*. In contrast to the facts of this case, the foreign corporation involved in *Allenberg* had regularly executed and concluded purchases of cotton in that state, maintained a perpetual revolving inventory of cotton in Mississippi, and thus appears to have had an extensive purely intrastate component to its interstate business.

Second, the New Jersey tolling statute has the same impermissible effect as did the statutes invalidated in *Sioux Remedy* and *Allenberg*. It denies Searle an important right in litigation unless Searle subjects itself to the "severe hazards" of making itself amenable to suit in any and all cases in New Jersey. Indeed, the New Jersey statute is more harsh in its operation than were the statutes in *Allenberg* and *Sioux Remedy*. In those cases, the sole

[12]Perhaps the clearest demonstration of the basic point is that, because Searle has no office or facility in New Jersey and has no employees in New Jersey with the power to enter into contracts or take orders, it does not even "transact business" within the meaning of New Jersey's registration statutes. *See Materials Research Corp.* v. *Metron*, 64 N.J. 74, 312 A.2d 147 (1973); *compare, Eli Lilly & Co.* v. *Sav-On Drugs, Inc.*, 366 U.S. 276 (1961).

effect of the statutes was to deny foreign corporations the benefit of access as a plaintiff to one of several possible forums.[13] They did not preclude them from obtaining a favorable judgment. In contrast, because it operates on defendants, the New Jersey tolling statute absolutely denies Searle the right, enjoyed by all other litigants, to have a suit dismissed under the statute of limitations and thus obtain a judgment in its favor. Furthermore, because there is no other way for Searle to appoint a registered agent, the only way it can avoid the tolling statute is to assume, by the statutes terms, the "same duties" of corporations incorporated in New Jersey. N.J.S.A. 14A: 13-2. For all these reasons, the tolling statute is invalid *per se*.

B. The New Jersey Statute Is Invalid Because The Burden Imposed On Interstate Commerce Is Disproportionate To Any Legitimate Local Benefit.

Second, even if the New Jersey tolling statute were not invalid *per se*, the statute is unconstitutional because its burden on interstate commerce "is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 441 (1978). There is no "legitimate local purpose" that the New Jersey statute promotes which is sufficient to justify the statute's adverse effect on interstate commerce. Indeed, to the extent the New Jersey law advances any permissible local objectives, these can readily be attained by alternative means that will entirely avoid the burdens on commerce.

1. The Burden On Interstate Commerce Is Substantial.

This Court has held that statutes like the one at issue here have a "particularly burdensome" effect on interstate commerce.

[13]Even if there were any doubt about the claimant's access to federal court or other state courts—which there was not—the fact remained the foreign corporation could have assured there would be available forums by inserting forum selection clauses into the sales contracts. *Cf. National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311 (1964).

Sioux Remedy Co. v. *Cope*, *supra*, 235 U.S. at 204-05. By conditioning a foreign corporation's right to plead the statute of limitations on its appointment of a resident agent, New Jersey has withheld a critical right from defendants, like Searle, unless "the corporation renders itself amenable to suit in all the courts of the State by whosoever chooses to sue it there." *Ibid.*

The significance of this burden is particularly great in the case of corporations like Searle. Searle is now subject to long-arm jurisdiction in New Jersey in many product liability suits—*e.g.*, whenever its products were sold in New Jersey and the alleged injury and treatment occurred there. Because of the great volume of this litigation, Searle would have no choice but to do whatever necessary to obtain the benefit of the statute of limitations if the tolling statute were valid. However, by appointing a registered agent, Searle would greatly expand its amenability to suit in New Jersey. Under the "fairness" standard test that now determines whether Searle is subject to suit in a particular case, the decisive factors are on "the relationship among the defendant [Searle], the forum [New Jersey] and the [particular] litigation." *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977); see *Rush* v. *Savchuk*, 444 U.S. 320, 327-330 (1980). There is much litigation involving Searle that has absolutely *no* relationship to New Jersey. For example, in suits involving Searle securities that are issued elsewhere, contracts made and executed in other states, and corporate decisions made elsewhere, there would be no relationship between the litigation and a New Jersey forum. Because Searle itself has at most an attenuated relationship with New Jersey, New Jersey could not assert *in personam* jurisdiction over Searle in such cases under the "fairness" standard. *See Shaffer* v. *Heitner*, *supra*, 433 U.S. at 213-217; *Rush* v. *Savchuk*, *supra*, 444 U.S. at 327-330; *cf. World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). Nevertheless because consent is a basis for personal jurisdiction when no minimum contacts exist, Searle would be subject to suit in New Jersey in *all* such cases if it appointed a

registered agent, even on such "foreign" causes of action that are unrelated to New Jersey.[11] *See National Equipment Rental Ltd.* v. *Szukhent*, 375 U.S. 311 (1964); *Neirbo* v. *Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165 (1939); *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U.S. 93 (1917); pp. 16-17, *supra*.

The effect of statutes like the New Jersey statute on interstate commerce is devastating. "If one State can impose such conditions, others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of . . . rights directly arising out of and connected with such commerce." *Sioux Remedy Co.* v. *Cope*, *supra*, 235 U.S. at 205. Indeed, if every state enacted such a statute, corporations like Searle would be subject to suit in every state in any suit. Because the functioning of interstate commerce would be seriously disrupted if corporations could be burdened with suits in inconvenient forums, the Commerce Clause itself prohibits such burdens on interstate commerce. *See, e.g., Davis* v. *Farmers' Co-operative Equity Co.*, 262 U.S. 312, 317-18 (1923); *Scanapico* v. *R.F.& P. R. Co.*, 439 F.2d 17, 25-28 (2nd Cir. 1970) (en banc.).

The interference with interstate commerce is compounded by the fact that the only way Searle can appoint a registered agent and avoid the New Jersey tolling statute is by obtaining a "certificate of authority" and thereby generally subjecting itself, by the terms of the statute, to the "duties, restrictions, penalties, and liabilities" imposed on domestic New Jersey corporations. *See* N.J.S.A. 14A:13-2, 13-4. Because these burdens have been held to be *per se* impermissible elsewhere, a state statute that so interferes with interstate commerce can plainly be valid only if neces-

---

[11] The doctrine of *forum non conveniens* might afford Searle some minimal protection against litigating matters in New Jersey where it would be a grossly inconvenient forum. However, because this doctrine is limited in scope, and wholly discretionary, it affords little protection. *See generally Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947).

sary to achieve the most important local objectives. The New Jersey tolling statute does not pass this or any other test.

2. The Local Benefits Are Insufficient To Justify These Burdens.

The New Jersey tolling statute has been defended on the ground that it is easier for a plaintiff to obtain jurisdiction over a foreign corporation by serving a registered agent in New Jersey than it is to effect extraterritorial service under the long-arm provisions. However, none of New Jersey's three purported reasons for wishing to simplify matters for plaintiffs suing foreign corporations in New Jersey even begins to justify the burden on commerce.

One state interest that has been identified is assuring plaintiffs a New Jersey forum and sparing them the "burden" of "gather[ing] sufficient information to satisfy a court that [the extraterritorial] service is 'consistent with due process of law.' " *Velmohos* v. *Maren Engineering Corp., supra*, 416 A.2d at 381. However, this Court held in *Shaffer* v. *Heitner* that any interest in relieving plaintiffs the obligation of establishing jurisdiction under the "minimum contacts" test, in assuring a forum, and in thus simplifying litigation for the plaintiff is illegitimate *per se*.

> "[W]hen the existence of jurisdiction in a particular forum under [the fairness standard of] *International Shoe* is unclear, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of 'fair play and substantial justice.' *That cost is too high.*" 433 U.S. at 211 (emphasis added).

Plainly, the State's interest is even less sufficient here where the question is not the existence of *quasi in rem* jurisdiction under the Due Process Clause, but the permissibility of particularly burdensome restrictions under "such higher standards as the Commerce Clause may entail." *Scanapico* v. *R.F. & P.R. Co.*, 439 F.2d 17, 26 (2nd Cir. 1970) (en banc).

A second local benefit that is asserted arises from the fact that the New Jersey long-arm rule requires that a plaintiff determine, after "diligent inquiry", that there is no means of effecting service in the State before he may resort to extraterritorial service. In other words, the New Jersey rule requires that two steps must be followed for extraterritorial service whereas only one step must be followed for in-State personal service. The Court of Appeals held that the State interest in sparing plaintiffs the burden of going through two modest steps, rather than one, justifies a statute that absolutely denies the statute of limitations to unrepresented corporations and effectively requires them to consent to any suit in New Jersey.

There is no merit to the Court of Appeals' reasoning. Even assuming the statute operated to simplify matters for plaintiffs,[15] any local benefit is far too slight to justify the burden on commerce. More fundamentally, because the rule preferring in-State to extraterritorial service is entirely a creation of New Jersey state law and serves no discernible purpose, there obviously is an alternative means of achieving the State interest that would not burden interstate commerce. All New Jersey needs to do is to repeal its archaic requirement that a plaintiff show inability to serve process within the state or modify it if the statute of limitations would otherwise expire. Clearly, a State cannot place minor obstacles in the path of a local party and then rely on the existence of these obstacles to burden interstate enterprises. State regulation must adopt the means of achieving any legitimate purpose that imposes the fewest burdens on interstate commerce. *See, e.g., Pike* v. *Bruce Church, Inc., supra,* 397 U.S. at 142; *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349 (1951).

[15]There is considerable evidence that plaintiffs find long-arm service easier than service on an appointed agent. For example, in one recent case, the plaintiff sued two foreign corporations, one of whom had an appointed agent, but one of whom did not. The plaintiff effected long arm service on *both* corporations. *See* Jurisdictional Statement, *Maren Engineering Corp.* v. *Velmohos,* No. 80-629, p.10.

The final local interest that is allegedly served by the New Jersey tolling statute is that it protects those plaintiffs who could not locate a foreign corporation "in the sprawling country beyond New Jersey's borders," *Velmohos* v. *Maren Engineering Corp.*, *supra*, 416 A.2d at 380, but who could locate an appointed agent or office of the foreign corporation located in New Jersey. This local interest is not even involved in the present case because Searle's identity as the manufacturer of Enovid and its address in Skokie, Illinois, were known to respondents at least four years before the filing of suit.[16] But even if local interest were advanced here, any local benefit simply cannot justify the interference with commerce that results. The tolling statute does *not* toll the statute of limitations *only* during the period in which the plaintiff could not reasonably have located and served the foreign corporation. On the contrary, it indefinitely postpones the running of the statute of limitations, tolling it for decades after the plaintiff first learned the out-of-state defendant's location. Any local interest could readily be advanced by a narrowly drawn statute that would avoid the great burden on interstate commerce entirely. There is an obvious less restrictive alternative.

Moreover, there are provisions in *existing* New Jersey law that promote this interest—or could be readily adapted to doing so—without burdening interstate commerce. New Jersey courts have held that a cause of action does not accrue until the existence of a cause of action against a particular defendant could reasonably be discovered. This doctrine could readily be applied to extend the limitations period until the defendant's location can be discovered.[17] In addition, New Jersey law provides that a plaintiff

[16]Thus, although respondents made numerous attempts to avoid the two-year statute of limitations, see p. 7 n.4, *supra*, respondents have never argued in this case that they had any difficulty locating Searle.

[17]Indeed, the "discovery" rule has already been extended to protect plaintiffs who are aware of the basis of their claims, but unaware of the proper *identity* of a potential defendant. *E.g. Aruta* v. *Keller*, 134 N.J. Super. 522, 342 A.2d 231 (App. Div. 1975).

can file a complaint and stop the running of the statute of limitations without serving the defendant with process. Such complaints are absolutely immune from dismissal for six months after filing and may not be dismissed thereafter if the plaintiff demonstrates his diligence in attempting to locate and serve the defendant. See N.J. Ct. Rules 1:13-7, 4:2-2.[18]

For all these reasons, the burden on interstate commerce is plainly disproportionate to any legitimate local benefits. The tolling statute is thus invalid under the Commerce Clause as applied to corporations like Searle.

II. The New Jersey Statute Violates The Due Process And Equal Protection Clauses Of The Fourteenth Amendment.

The New Jersey statute further violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The statute imposes an unconstitutional condition on Searle's exercise of its due process rights. There is no sufficient justification for the discrimination against unregistered foreign corporations that are not "doing business" in New Jersey.

---

[18]The Court of Appeals stated (Cert. Pet. 24a), that it does not believe that this procedure affords plaintiffs the same protection as the tolling statute because it doubted that, given crowded calendars, state courts would permit these complaints to remain on the docket for indefinite periods of time. This reasoning is flawed and plainly does not affect Searle's Commerce Clause claim. First, this procedure need not *indefinitely* postpone the statute of limitations to be an adequate alternative. All it need do is protect a plaintiff who cannot locate a defendant. Second, there is no basis for the Court's suggestion that New Jersey courts would disobey the terms of the law and dismiss suits when the plaintiff had not and could not, in the exercise of due diligence, locate and serve the defendant. Indeed, New Jersey could have liberally applied this rule when dismissal would erect a statute of limitations bar. *See Cooke* v. *Yarrington*, 62 N.J. 123, 299 A.2d 400, 402-03 (1973). Finally, whether this procedure or any other existing New Jersey procedure is in fact now adequate is not the issue. The point is that New Jersey has a variety of procedures available to it that will protect its legitimate local interests without unduly burdening interstate commerce.

A. The Statute Unconstitutionally Burdens Searle's Rights Under The Due Process Clause.

It is basic that a State may not require any person to forego a constitutional protection as a condition to the enjoyment of a state right or privilege. *See, e.g., Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). This principle is fully applicable to attempts by states to impose unconstitutional conditions on foreign corporations. In *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922), for example, this Court held that a State may not condition a foreign corporation's "valuable privilege" of "doing business" in the State on the corporation's waiver of its constitutional right to remove actions brought in state court to federal district court. Last term, moreover, this Court held, after an exhaustive analysis of the relevant cases, that it is "now established" that although a State has authority to regulate foreign corporations that are "doing business" within its boundaries, it may not impose conditions that require the relinquishment of constitutional rights. *Western and Southern Life Ins. Co.* v. *State Bd. of Equalization*, U.S. , 49 L.W. 4542, 4544-47 (May 26, 1981). It follows *a fortiori* that a State like New Jersey cannot constitutionally extract waivers of constitutional rights from a corporation like Searle that is *not* "doing business" in the State. Yet that is precisely the effect of the New Jersey tolling statute.

The interests affected by the New Jersey statute are far more clearly of constitutional dimensions than was the right to invoke diversity jurisdiction at stake in *Terral* v. *Burke Construction Co.*, *supra*. All persons have a right under the Due Process Clause of the Fourteenth Amendment not to be sued on claims in the courts of any state when the minimum contacts test of *International Shoe* and its progeny cannot be satisfied. *See, e.g., Rush* v. *Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). The New Jersey tolling statute, however, bars a foreign corporation from exercising the important right to plead the statute of limitations unless it waives this fundamental interest protected by the Due Process Clause.

For the reasons previously stated (see pp. 25-28, *supra*), none of the interests that the New Jersey tolling statute purportedly serves are sufficiently compelling to justify the statute's interference with this constitutional right. The asserted interest in sparing plaintiffs the burden of demonstrating minimum contacts is impermissible *per se*. *See Shaffer* v. *Heitner*, 433 U.S. 186, 211 (1977). The local interests of simplifying service of process for the plaintiff and tolling the statute of limitations when an out-of-state defendant cannot be located can each clearly be advanced by methods that will not adversely affect Searle's constitutional rights.[19]

B. The Tolling Statute Impermissibly Discriminates Against Foreign Corporations That Are Not "Doing Business" In The State.

Finally, quite apart from the foregoing matters, the New Jersey tolling statute violates the Equal Protection Clause. The New Jersey tolling statute prohibits a corporation that is not "doing business" in the State and that has not therefore registered an agent to accept service of process from *ever* asserting the statute of limitations, even though the corporation was amenable to long-arm jurisdiction in the State in the particular case at all relevant times. In contrast, all domestic corporations and all registered

[19]There may, of course, be foreign corporations that have such extensive activities in and such a strong relationship with forums, like New Jersey, that it would be constitutionally permissible for the State to treat the corporation as "domiciled" in New Jersey and thus as generally subject to suit in New Jersey. However, New Jersey has never attempted to justify its application of the tolling statute to corporations like Searle on such a ground. On the contrary, to the extent it seeks to "domesticate" corporations with extensive activities in the State, New Jersey advances this objective through its statute that requires corporations that "transact business" in New Jersey to appoint agents and comply with registration requirements. N.J.S.A. 14A:13-1, *et seq*. Yet this statute indisputably does not apply to Searle, and, for the reasons stated in Part I.A, *supra*, it could not constitutionally be applied to corporations, like Searle, that are engaged only in interstate business in New Jersey.

foreign corporations doing business in the State may claim the benefit of the statute of limitations. This statutory classification does "not rest on some ground of difference" that has a substantial relationship to any permissible object of the legislation and flatly violates the constitutional prohibition against disparate treatment of "persons similarly circumstanced." *Reed* v. *Reed*, 404 U.S. 71, 75-76 (1971), *quoting Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).

Although the New Jersey statute will not satisfy even the "familiar 'rational basis' test", *see Minnesota* v. *Clover Leaf Creamery Co.*, U.S. , 49 L.W. 4111, 4112 (January 21, 1981), this statute must satisfy a heightened standard of review to be constitutional. First, because the statute affects fundamental constitutional rights under the Due Process and Commerce Clauses, *see* pp. 18-28, *supra*, strict scrutiny is required. *See Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Second, because registered corporations "doing business" in New Jersey and domestic corporations can assert the statute of limitations, the burden of the law falls exclusively on enterprises that are *not* doing business in New Jersey and that are not represented in this State's legislature. In this circumstance, a statute must be carefully scrutinized. *See Austin* v. *New Hampshire*, 420 U.S. 656, 662 (1975); *Allied Stores* v. *Bowers*, 358 U.S. 522, 532-33 (1959) (Brennan, J., concurring); *cf. Hicklin* v. *Orbeck*, 437 U.S. 518 (1978).

The classification at issue here will not withstand any level of scrutiny, heightened or otherwise. Because corporations like Searle are indisputably readily subjected to long-arm jurisdiction, there is no justification for *forever* denying them the benefit of the statute of limitations that all other corporations can assert. As Searle has already demonstrated (pp. 25-28, *supra*), the three reasons the Court of Appeals advanced for the statutory discrimination are lacking in substance, and they are palpably insufficient to justify the classification. Any state interest in ensur-

ing that a plaintiff can sue a defendant in New Jersey even when the fairness test of *International Shoe* cannot be met is insufficient *per se*. *Shaffer* v. *Heitner*, *supra*, 433 U.S. at 211. The supposed state interest in protecting plaintiffs against the burdens of locating out of state defendants and effecting service on them is similarly inadequate. The existing New Jersey procedures can already afford plaintiffs these protections, *see* N.J. Ct. Rule 1:13-7, 4:2-2, so any additional measures provided by the tolling statute are superfluous.

More fundamentally, the tolling statute indefinitely prohibits the assertion of the statute of limitations even where, as here, the plaintiff had no difficulty locating or serving the foreign corporation. If the purpose of the tolling statute is to protect plaintiffs against the difficulties of making extraterritorial service, the equal protection clause demands that the length of time that the statute is tolled bear some relationship to delays a plaintiff experiences because of these difficulties. Here, in contrast, there is absolutely *no* relationship between the means selected and the supposed legislative objective.[20] The sole effect of the tolling statute to create the absurd anomaly that the timing of suits against unrepresented foreign corporations would be entirely controlled by the whim, caprice, and convenience of plaintiffs. The Oklahoma Supreme Court has emphasized the irrationality of such a result:

> "Residents of our 49 sister states would always be in peril of being subjected to litigation about events which occurred in the distant past and, as the trial judge correctly pointed out, in some situations the threat would remain even against their estates. The proper time for commencement of litigation against nonresidents would be controlled only by the whim, caprice, and convenience of plaintiffs." *Wright* v. *Keiser*, 568 P.2d 1262, 1265 (Okla. Sup. Ct. 1977).

[20]The effect of the statute is to create a permanent, *irrebuttable* presumption that unregistered foreign corporations like Searle cannot ever be readily located and served. This is an independent ground for finding the statute to be violative of the Fourteenth Amendment. *See Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973).

The fact that there is *no* substantial relationship between the statutory means and the sole permissible statutory objective that has been identified is dispositive. However, there is a more fundamental reason why this statute cannot constitutionally be applied here. The legislative purposes identified by the Court of Appeals plainly were not the goals of the legislature that enacted the statute, and the application of the tolling statute to Searle unquestionably cannot advance any objective of that legislature.[21]

The reality is that there was no long-arm jurisdiction when the present version of the tolling statute was enacted in 1949. The sole purpose of the statute, as enacted, therefore, was to preserve a plaintiff's cause of action when there was no means of obtaining *in personam* jurisdiction over a foreign corporation in New Jersey. The circumstance that the tolling statute became potentially applicable to suits against defendants readily amenable to suit in New Jersey arose, in 1958, when the New Jersey Supreme Court promulgated its long-arm rule. The New Jersey legislature quite simply has never made a conscious policy choice that unrepresented defendants amenable to long-arm jurisdiction should indefinitely be precluded from asserting the statute of limitations. This anomaly has arisen, rather, because different organs of the

---

[21]The Court of Appeals held that it was enough if some legitimate state purpose would be advanced, even if the legislature never expressly intended to further this goal. However, in assessing similar claims under the Due Process and Equal Protection Clauses, this Court has held the focus should be on whether the statute actually furthers the actual purpose of the legislature that enacted it, particularly where, as here, the statute affects important constitutionally protected interests. A statute may not be upheld on the basis of a supposed objective where, as here, "an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger* v. *Weisenfeld*, 420 U.S. 636, 648 n.16 (1975); *see also State of Minnesota* v. *Clover Leaf Creamery Co.*, *supra*, 49 L.W. at 4113 n.7; *Schweiker* v. *Wilson*, U.S. , 49 L.W. 4207, 4213 (March 3, 1981) (dissenting opinion of Powell, J.); *but cf. United States Railroad Retirement Bd.* v. *Fritz*, U.S. , 49 L.W. 4035, 4038 n.10 (Dec. 9, 1980).

Government of New Jersey acted at different times and prescribed discrete rules, without ever explicitly considering the consequences for defendants amenable to long-arm jurisdiction.

The anomalous nature of the New Jersey tolling statute is graphically illustrated by the fact the New Jersey legislature has never intended to require corporations like Searle to register to do business in New Jersey. *See Materials Research Corp.* v. *Metron*, 64 N.J. 74, 312 A.2d 147 (1973). Yet the tolling statute effectively requires them to do so.

Because foreign corporations, like Searle, are amenable to long-arm jurisdiction, the application of the tolling statute to them is not necessary to preserve a plaintiff's right to sue in New Jersey or to further the sole goal the New Jersey legislature sought to achieve in 1949. In any case, because the New Jersey statute discriminates against unrepresented foreign corporations when there is no substantial relationship between such discrimination and even the *post hoc* hypothetical purposes identified by the Court of Appeals, the statute violates the Equal Protection Clause.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

RAYMOND M. TIERNEY, JR.
MICHAEL P. MURPHY
SHANLEY & FISHER
550 Broad Street
Newark, New Jersey 07102
(201) 643-1220
Attorneys for Petitioner

Of Counsel:

WILLIAM P. RICHMOND
DAVID W. CARPENTER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 329-5400

July 6, 1981

Office - Supreme Court, U.S.
FILED
SEP 23 1981
ALEXANDER L. STEVAS
CLERK

No. 80-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G.D. SEARLE & CO.,
Petitioner,

v.

SUSAN COHN AND WALTER COHN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE RESPONDENTS

WALTER R. COHN
15 Valley Street
South Orange, New Jersey 07079
(201) 762-6444
Attorney for Respondents

On the Brief:

THOMAS E. COHN, ESQ.
RICHARD M. FLEXNER, ESQ.
15 Valley Street
South Orange, New Jersey 07079
(201) 762-6444

The Superior Appellate Printing Company, Cranbury, NJ 08512

QUESTIONS PRESENTED

1. Whether the New Jersey Tolling Provision, *N.J.S.A.* 2A:14-22, is a constitutionally valid legislative enactment, providing a rational basis for acknowledging the degrees of difficulty in first locating, and secondly, in effectuating service of process as between represented foreign corporations and non-represented foreign corporations.

2. Whether a Court may imply terms beyond the clear language and intent of the New Jersey Legislature so as to substitute its judgment for that of the Legislature.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
NEW JERSEY STATUTES AND NEW JERSEY COURT RULES	2
STATEMENT OF THE CASE	5
SUMMARY OF LEGAL ARGUMENT	9
LEGAL ARGUMENT	13
I. The Interpretation of the Tolling Provision by the New Jersey Supreme Court is dispositive of the statutory construction and Courts do not interpose their judgment for that of the State Legislature	13
A. The determination by the New Jersey Supreme Court that the tolling provision's phrase "represented in this state" means designation or appointment of an agent with the New Jersey Secretary of State is dispositive of the statutory construction	13
B. Courts do not interpose their judgment for that of the State Legislature	16
II. The New Jersey tolling statute, *N.J.S.A.* 2A:14-22, is a constitutionally valid legislative enactment under the Due Process, Equal Protection and Commerce Clauses of the Constitution of the United States and is rationally related to a constitutionally permissible goal	19

A. The Tolling Provision surpasses the review standard of "minimum scrutiny", furthers a legitimate state objective, and satisfies the Due Process and Equal Protection Clauses of the United States Constitution 19

B. The statute is constitutional because the State's interests are substantial, the burdens on non-resident corporations are negligible and the burdens on interstate commerce are non-existent 22

CONCLUSION 29

TABLE OF AUTHORITIES

Cases	Page
Allenberg Cotton Co. v Pittman, 419 U.S. 20 (1974)	25,26
Bibb v Navajo Freight Lines Inc., 359 U.S. 520 (1959)	24
Breard v City of Alexandria, La., 341 U.S. 622, Rehearing denied; 342 U.S. 843 (1951)	12,24
Campbell v Holt, 15 U.S. 620 (1885)	19
Chase Securities Corp. v Donaldson, 325 U.S. 304 (1945)	11, 12,20
Cleveland v National College of Business, 435 U.S. 213, 221 (1978)	22
Cohn v G.D. Searle & Co., 447 F. Supp. 903 (D.N.J. 1978) revd., — F.2d. — (Docket No. 79-2406 and 79-2605. 3rd Cir. July 23, 1980)	7
Cooley v Board of Wardens, 53 U.S. 299, 319 (1951)	23
Dew v Appleberry, 23 Cal. 3d. 630, 591 P.2d 509 (1980)	14
Duke University v Chestnut, 28 N.C. App. 568, 221 S.E. 2d 895 (1976)	14
Flemming v Nestor, 363 U.S. 603 (1960)	20
Griswold v Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965)	16
H.J. Govan v Trade Bank and Trust Co., 109 N.J. Super. 271 (N.J. App. Div. 1970)	28
Hopkins v Kelsey-Hayes, Inc., 463 F. Supp 539 (D.N.J. 1978) — F.2d. — (Docket No. 79-1881)	7,10,16
International Shoe Machinery Comp. v Washington, 326 U.S. 310 (1945)	17,27
Lemke v Bailey, 41 N.J. 295, 1961 A.2d 523 (1963)	19
Lloyd Fry Roofing Co. v Wood, 344 U.S. 157 (1952)	27
Malmed v Thornburgh, 79-2467 slip opinion at 7, (3rd Cir., May 13, 1980) (Aldisert, J.)	11,20

Marsh v Davis, 99 N.J. Super. 130 (1968) 28

Moore v Illinois Central R. Co., 312 U.S. 630 (1941) ... 13

Pike v Bruce Church, Inc., 397 U.S. 137 (1970) 24,27

Sioux Remedy Co. v Cope, 235 U.S. 197 (1914) 25,26

Southern Pacific Co. v Arizona, 325 U.S. 761 (1945) ... 27

Standard Oil Co. v Tennessee, 217 U.S. 413 (1910) 13

Trafalet v Thompson, 594 F.2d 623 (7th Cir.) Cert. denied, U.S., 48 U.S.L.W. 3239 (Oct. 1, 1979) 20

Tioga R.R. v Blossburg & Corning R.R., 20 Wall 137, 22 L. Ed. 331 (1873) 10

Vaughn v Deitz, 430 S.W. 2d 487 (Tex. 1968) 14

Velmohos v Maren Engineering Corp., 83 N.J. 282, 410 A.2d 372 (1980) ..... 7, passim

Weinberger v Salfi, 422 U.S. 749 (1975) 20

Williams v State of Oklahoma, 348 U.S. 576 Rehearing denied, 359 U.S. 956 (1959) 13

Williamson v Lee Optical Inc., 348 U.S. 483 (1955) 20

Zalatuka v Metropolitan Life Insurance Co., 90 F.2d 230 (7th Cir. 1937) 14

Zwillenberg v Post, 293 F.2d 199 (3rd Cir. 1961 28

CONSTITUTIONAL PROVISIONS, STATE STATUTES AND COURT RULES

Fourteenth Amendment to the United States Constitution 6,22

Commerce Clause of the United States Constitution ... 12

New Jersey Statutes Annotated .....

N.J.S.A. 2A:14-2 2,5

N.J.S.A. 2A:14-21 6,9,10

N.J.S.A. 2A:14-22 ..... 2, passim

N.J.S.A. 14A:13-3 (2)(3) 3,23,24

N.J.S.A. 14A:13-11 (2) 3,23,24

New Jersey Court Rule *R.* 4:4-4 (c)(1) 4,17,25

No. 80-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G.D. SEARLE & CO.,
Petitioner,

v.

SUSAN COHN AND WALTER COHN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 628 F.2d 801 and is reproduced in the Petition for Certiorari (pp. 1a-25a). The judgment of said Court appears in the Joint Appendix (pp. 74a-75a).

The decision of United States District Court for the District of New Jersey appears at 447 F. Supp. 903 (D.N.J. 1978). It is also appended to the Petition for a Writ of Certiorari (pp. 28a-49a) and to the Joint Appendix (pp. 26a-48a).

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

NEW JERSEY STATUTES AND NEW JERSEY COURT RULES

New Jersey Statutes Annotated, 2A:14-2

> Every action at law for an injury to a person caused by the wrongful act, neglect or default of any person within this state shall be commenced within two years after the cause of any such action shall have accrued.

New Jersey Statutes Annotated, 2A:14-22

> If any person against whom there is any of the causes of action specified in Sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of Article 2 of this chapter is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the Section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said Section, exclusive of such time or times of non-residence or non-representation. (Emphasis added)

New Jersey Statutes Annotated, 14A:13-3(2)(3)

• • •

(2) Without excluding other activities which may not constitute transacting business in this State, a foreign corporation shall not be considered to be transacting business in this State, for the purposes of this act, by reason of carrying on in this State any one or more of the following activities:

(a) maintaining, defending or otherwise participating in any action or proceeding, whether judicial, administrative, arbitrative or otherwise, or effecting the settlement thereof or the settlement of claims or disputes;

(b) holding meetings of its directors or shareholders;

(c) maintaining bank accounts or borrowing money, with or without security, even if such borrowings are repeated and continuous transactions and even if such security has a situs in this State;

(d) maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

(3) The specification in subsection 14A:13-3(2) does not establish a standard for activities which may subject a foreign corporation to service of process or taxation in this State.

New Jersey Statutes Annotated, 14A:13-11(2)

• • •

(2) The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this State.

New Jersey Court Rule 4:4-4(c)(1)

Service of summons, writs and complaints, shall be made as follows:

• • •

(c) Corporations, Partnerships and Associations

(1) Corporations. Upon a domestic or foreign corporation, by serving, in the manner prescribed in paragraph (a), either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

STATEMENT OF THE CASE

On December 22, 1963, Plaintiff-Respondent, Susan Cohn suffered a cerebral vascular accident (a stroke) allegedly as the result of the ingestion of a birth control pill. That event has left her left arm and left leg permanently paralyzed and has resulted in other physical and psychological injury as well. The pill was manufactured by Defendant-Petitioner, G.D. Searle & Co., a Delaware corporation with its principal office in Illinois. At that time, the hormonal concentration contained in the pill was eight to ten times greater than that contained in similar pills today. Also, there were no warning labels on the packages as there are today, advising a user that severe medical contraindications might result from use of the product. Nor was there medical evidence available linking the ingestion of birth control pills with severe side effects such as those sustained by Mrs. Cohn.

By Complaint filed January 29, 1974, Plaintiffs-Respondents Susan Cohn and Walter R. Cohn, her husband, instituted suit against Defendant-Petitioner. Their Complaint, predicated on theories of negligence, breach of warranty, statutory violations and strict liability with a per quod count for Walter Cohn, was filed in the Superior Court of New Jersey, Law Division, Essex County. On April 1, 1974 by motion of G.D. Searle & Co., the case was removed to the United States District Court for the District of New Jersey, pursuant to 28 *U.S.C.* § 1441. Jurisdiction was vested in the United States District Court under 28 *U.S.C.* § 1332.

On September 8, 1975, Defendant-Petitioner moved for an order for entry of a summary judgment and for a dismissal of the Complaint with prejudice, on the grounds that the action was barred by the Statute of Limitations, *N.J.S.A.* 2A:14-2. Plaintiffs argued that because Defendant was a foreign corporation not represented within New Jersey by "any person or officer" upon whom original process could be served, the Tolling Provision of the Statute of Limitations, *N.J.S.A.* 2A:14-22 became operative, thereby preserving Plaintiffs' cause of action.

Petitioner contended that its inability to non-suit Plaintiffs on procedural grounds as a result of the application of the Tolling Provision constituted a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

The opinion of the United States District Court for the District of New Jersey was published at 447 *F. Supp.* 903 (1978). The Court addressed itself to two issues of first impression: (1) whether or not amenability to long-arm jurisdiction created a "representation" within New Jersey within the meaning of the tolling statute, *N.J.S.A.* 2A:14-22 and (2) whether or not the tolling statute as applied to a foreign corporation subject to long-arm jurisdiction violated the Equal Protection clause of the United States Constitution. The Court decided the former issue in the negative. *Id.* at 910. As to the latter, however, the Court found that the statute denied equal protection to foreign corporations amenable to long-arm jurisdiction. *Id.* at 912.

On July 26, 1979, after a hearing on the issue of whether or not Plaintiffs were entitled to the benefit of New Jersey's equitable discovery rule, the Court rendered a second opinion. (Joint Appendix at p. 49a). This second opinion is unpublished. In summary, the rulings were: (a) that amenability to jurisdiction under the long-arm rule did not render the Tolling Provision inapplicable to Defendant; (b) that the statute deprived Defendant of equal protection and was unconstitutional; (c) that in determining the impact of the statute on Plaintiffs' case, Plaintiffs were entitled to the benefits of the discovery rule; and (d) that Mrs. Cohn's mental depression established by the proofs did not constitute a "disability" within the meaning of *N.J.S.A.* 2A:14-21, so as to toll the running of the Statute of Limitations.

Plaintiffs' motion before that Court for a new trial was denied by the Hon. Curtis Meanor on August 29, 1979. A Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed on September 14, 1979 and was docketed

on October 9, 1979. On October 18, 1979, Defendant-Respondent filed a Notice of Cross-Appeal. The case of *Cohn v Searle* was consolidated for purposes of argument and decision with the case of *Hopkins v Kelsey-Hayes, Inc.*, which pending case encompassed essentially the same issues.

While *Cohn* and *Hopkins* were pending before the Third Circuit, the New Jersey Supreme Court decided *Velmohos v Maren Engineering Corp.*, 83 N.J. 282, 410 A.2d 372 (1980). The *Velmohos* decision, involving identical issues, held: (a) that the New Jersey Legislature had decided to maintain the integrity of the Tolling Provision even with the creation of the long-arm rule; (b) the Tolling Provision acts to preserve a potential plaintiff's cause of action where the defendant might not be amenable to long-arm jurisdiction because its whereabouts outside the State would not be readily discernible; (c) the object of the Legislature was to deny to a foreign corporation without an in-state representative upon whom original process might be served the unjust reward of immunity from suit because it was secreted from view; (d) the possible use of long-arm jurisdiction over certain corporations was held not to be duplicative of the Tolling Provision since long-arm service is not available in those instances where the potential New Jersey litigant cannot guess among which of the other forty-nine states to search for its defendant; (e) the statute furthers the goal of preserving Plaintiffs' causes of action when a Defendant does not have an in-state agent for purposes of service of process; (f) the statute is rationally related to achieving a constitutionally permissible objective. Therefore, the Tolling Provision was upheld by the New Jersey Supreme Court in *Velmohos.*

In upholding the reasoning of the *Velmohos* decision, the Third Circuit then rejected the constitutional claims advanced by this out-of-state Defendant, on the basis that it was not amendable to in-state service of process due to the absence of an in-state registered agent. *Cohn*, Petitioner's Brief for a Writ of Certiorari, at pp. 15a-24a. Again, the presumption of validity given to legislative enactments and the certain, rational basis of the statute in achieving a constitutionally permissible purpose

provided the foundation for upholding the Tolling Provision. The heavy burden of demonstrating the invalidity of a legislative enactment was not remotely sustained by Defendant-Petitioner.

The July 23, 1980 decision of the Third Circuit remanded this case to the Federal District Court in order that the trial on the merits might proceed and Defendant be held accountable or not for the product it had introduced into the consumer market and which was purchased and consumed by Mrs. Cohn. Defendant-Petitioner filed its petition seeking a Writ of Certiorari on October 21, 1980. The Supreme Court of the United States granted Petitioner's Writ of Certiorari on April 20, 1981.

SUMMARY OF LEGAL ARGUMENT

On December 22, 1963, Respondent Susan Cohn suffered a cerebral vascular accident (commonly called a stroke) allegedly as the result of the ingestion of the birth control pill "Enovid", which Petitioner manufactured and sold, leaving her left side permanently paralyzed and resulting in other physical and psychological injury as well.

At all times relevant herein, Petitioner-Defendant was a Delaware corporation with its principal office in Illinois. The United States District Court for the District of New Jersey, by the Hon. Curtis Meanor, in a supplementary, unreported opinion rendered on July 26, 1979 (Joint Appendix p. 56a) determined that Respondents-Plaintiffs were entitled to the benefit of the equitable discovery rule because concrete medical evidence linking Enovid with such medical reaction was not available in 1963. The Trial Court determined that 1970 was the date of discovery. Therefore, on this basis, Respondents-Plaintiffs concede that they did not institute suit until some three and one-half years following this judicially-determined date of discovery. Respondents appealed the finding of 1970 as the proper discovery date.

Additionally, Respondents have urged that Mrs. Cohn's severe depression was an additional factor affecting the commencement of the instant action, inasmuch as said condition rendered here "insane" within the meaning of *N.J.S.A.* 2A:14-21. However, inasmuch as the Third Circuit Court of Appeals ruled in favor of Respondents on other grounds, those issues are not before this Court at the present time and still remain as issues for ultimate determination.[1]

---

[1] Notwithstanding the establishment of an equitable discovery date of 1970, Respondents argued to the District Court, in the alternative, that the Statute of Limitations was tolled by *N.J.S.A.* 2A:14-21, which stops the running of the limitations period against persons who are "insane" when the cause of

(continued)

The United States Supreme Court has decreed that proscribing the nature and extent of a statute of limitation is an area which has been left within the discretion of a state legislature. "Statutes of limitation are in their nature arbitrary. They rest upon no other foundation than the judgment of a state as to what will promote the interests of its citizens. Each determines such limits and imposes such restraints as it thinks proper." *Tioga R.R. v Blossburg & Corning R.R.*, 20 Wall 137, 22 L. Ed. 331 (1873).

This Tolling Provision has been the subject of recent intensive litigation in the New Jersey State Courts (*Velmohos v Maren, supra; Hopkins v Kelsey-Hayes, Inc.*, 463 Fed. Supp. 539, (District of New Jersey, 1978) as well as in the instant proceeding in the United States Court of Appeals, Third Circuit. This judicial activity resulted in determinations by both the New Jersey Supreme Court in *Velmohos, supra*, and the United States Court of Appeals for the Third Circuit, sitting below in this consolidated suit that *N.J.S.A.* 2A:14-22 is a constitutionally valid expression of New Jersey's legislative intent; that the Tolling Provision serves the interests of the citizens of New Jersey by alleviating, to a limited extent, the hazards of commencing suit against a foreign, non-represented corporation. The public policy of adjudicating cases on the merits is furthered. Both

---

[1](continued)

action accrues. Respondents argued that Mrs. Cohn's mental condition, a servere depression, brought her within the ambit of *N.J.S.A.* 2A:14-21. In the course of the same opinion wherein the District Court established 1970 as the date of discovery, that Court rejected Respondents' alternative argument, holding that Mrs. Cohn's condition did not constitute "insanity" within the meaning of *N.J.S.A.* 2A:14-21. On appeal to the United States Court of Appeals for the Third Circuit, Respondents reiterated the argument that Mrs. Cohn's severe depression constituted "insanity" within the purview of *N.J.S.A.* 2A:14-21. However, as noted in Footnote 4 of Judge Garth's opinion for the Court of Appeals, "in light of our conclusion . . . that *N.J.S.A.* 2A:14-22 tolled the running of the limitations statute in this case, we need not, and do not, reach the merits of this contention." Thus, should the judgment of the Court of Appeals be affected by this Court, this case must be remanded to the Court of Appeals for a determination on this, as well as other remaining undecided issues.

Courts dealt directly with the constitutional issues raised herein, concluding that the Tolling Provision was rationally based and in furtherance of constitutionally permissible objectives. No impact was found upon any aspect of a corporation's capacity to engage in interstate commerce as a result of the Tolling Provision. Any supposed hardship accruing to a non-represented, foreign corporation doing business in New Jersey was easily outweighed by the public policy interests in preserving causes of action and adjudicating cases upon their merits.

In evaluating the constitutionality of a statute challenged on Equal Protection grounds, the initial inquiry by the Court is to ascertain the appropriate standard of review. The nature of the interest embodied by the availability of the defense of Statute of Limitations is not a fundamental interest nor a suspect classification. *See* e.g. *Chase Securities Corp v Donaldson*, 324 U.S. 304 (1945). With respect to the Tolling Provision, *N.J.S.A.* 2A:14-22, the appropriate standard of review is "minimum scrutiny" and the statute must only be rationally related to a constitutionally permissible purpose. Petitioner has the heavy burden of displacing the presumption of validity accorded legislative enactments. *See* e.g. *Malmed v Thornburgh*, (3rd Cir., May 13, 1980) (Aldisert, J.)

The goals of the New Jersey Legislature in enacting the Tolling Provision can be summarized as follows: (1) acknowledging the difficulty of locating certain out-of-state defendants; (2) minimizing the difficulty involved in effecting service of process; (3) avoiding the burdens and costs of establishing elaborate court mechanisms to judge, on a case by case basis, whether out-of-state defendants were, in fact, "amenable to long-arm jurisdiction" by a particular plaintiff; (4) protecting the people of New Jersey from out-of-state entities which may commit torts within the state and which may be secreted from the view of the aggrieved party; (5) underscoring the public policy reasons of adjudicating claims on their merits and of denying immunity from suit to those entities which would prefer to remain unaccountable for their actions. The New Jersey Tolling Provision is directly related to achieving these constitutionally

permissible goals. The nature, extent and duration of a Statute of Limitations is specifically within the ambit of the authority of a state legislature. *Chase Securities Corp. v Donaldson, supra.*

The application of the Tolling Provision has no impact upon Petitioner's ability to sell and transport its products in the New Jersey marketplace. Petitioner has not even attempted to demonstrate any impact whatsoever on its capacity to conduct its commercial activities as a direct result of the denial of the availability of the defense of Statute of Limitations. In any event, not all burdens upon commerce, but only undue or discriminatory ones, are proscribed by the Commerce Clause of the Federal Constitution. *Breard v City of Alexandria, La.*, 341 U.S. 622; Rehearing denied, 342 U.S. 843 (1951).

Congress' choice not to pre-empt each state's authority to enact its own Statute of Limitations evidences the absence of a need for national uniformity in this area. This statute cannot logically be said to prefer domestic corporations to foreign corporations with respect to their capacity to conduct business in New Jersey.

In *Velmohos, supra,* Justice Pashman, at p. 14a of Respondents' Brief in Opposition to Writ of Certiorari, n. 10, stated that foreign corporations can limit their exposure to suit simply by designating an in-state agent to accept service of process within the State. This is the state of the law in New Jersey. Therefore, Petitioner's argument that it must fully domesticate in New Jersey in order to obtain the benefits of the Statute of Limitations is wholly without merit. Because the statute does not violate any provision of the United States Constitution, the decision of the United States Court of Appeals for the Third Circuit should be affirmed.

POINT I

THE INTERPRETATION OF THE TOLLING PROVISION BY THE NEW JERSEY SUPREME COURT IS DISPOSITIVE OF THE STATUTORY CONSTRUCTION AND COURTS DO NOT INTERPOSE THEIR JUDGMENT FOR THAT OF THE STATE LEGISLATURE.

Subpoint A — THE DETERMINATION BY THE NEW JERSEY SUPREME COURT THAT THE TOLLING PROVISION'S PHRASE "REPRESENTED IN THIS STATE" MEANS DESIGNATION OR APPOINTMENT OF AN AGENT WITH THE NEW JERSEY SECRETARY OF STATE IS DISPOSITIVE OF THE STATUTORY CONSTRUCTION.

The ruling of the highest appellate court of a state in construing the applicable state statute of limitations must be followed by the federal courts and that construction is as binding upon the courts of the United States as the text of the statute itself. *See e.g. Moore v Illinois Central R. Co.* 312 U.S. 630 (1941); *Standard Oil Co. v Tennessee*, 217 U.S. 413 (1910); *Williams v State of Oklahoma*, 348 U.S. 576, rehearing denied, 359 U.S. 956 (1959); See also the opinion below of the Third Circuit Court of Appeals, at p. 13a, n. 8 of Petition for Writ of Certiorari. The New Jersey Tolling Provision deals with the concept of representation within the State. The goal of the Legislature is to provide plaintiffs or their attorneys with access to an in-state representative specifically for purposes of service of process. By contacting the New Jersey Secretary of State, a plaintiff can ascertain whether or not a business entity has so designated an in-state agent. In the *Velmohos* decision, the New Jersey Supreme Court definitively established the significance of the words of the statute. The Court said:

> While Courts of other States have construed Tolling Statutes to be inapplicable to foreign corporations subject to

> long-arm service, the statutes involved were phrased in terms of "absence" from the State — general language, which more readily lends itself to flexible interpretation . . . the New Jersey statute, however, is very narrowly drawn. It speaks not of presence or absence, but of representation within the State. Such language must be interpreted from the intent of the Legislature in light of the circumstances at the time of enactment . . . as Defendants themselves recognize, the circumstances prevailing at the time of the 1949 amendment did not include long-arm service on foreign corporations. We cannot accept the invitation to adopt this latter development as the premise for ignoring clear and unambiguous statutory language. *Velmohos, supra,* Respondent's Appendix, p. 12a.

Certainly, the United States Supreme Court decides Federal Constitutional issues and applies state statutes to constitutional questions. In New Jersey, the Tolling Provision becomes operative when no in-state representative for purposes of service of process is known to the Secretary of State. *Velmohos, supra.* At one time, Petitioner herein did have such a representative in New Jersey. However, in 1960 it opted to withdraw this representative for reasons of its own choosing.

The interpretation of the Tolling Provision by the New Jersey Supreme Court is similar to decisions in California, Texas, Ohio, South Carolina and North Carolina. (For California, see *Dew v Appleberry*, 23 Cal.3d. 630, 591 P.2d 509 (1980); for Texas, *Vaughn v Deitz*, 430 S.W.2d 487 (Tex. 1968); for North Carolina, see *Duke University v Chestnut*, 28 N.C. App. 568, 221 S.E.2d. 895 (1976). See also: *Zalatuka v Metropolitan Life Insurance Co.*, 90 F.2d 230 (7th Cir. 1937). (state legislature may distinguish between domestic and foreign insurance companies for purposes of determining time within which suits on insurance policies may be instituted or be forever barred.) Petitioner's brief is inaccurate and misleading in two respects when it states the *Velmohos* decision places New Jersey in a minority of jurisdictions: (1) as stated by Justice Pashman in n. 8 of the New Jersey Supreme Court opinion, Respondents'

Brief in Opposition, p. 12a, "Our result, today, differs from those of other Courts because of a difference of statutory language, not a defect in reasoning. Without describing and comparing the various tolling statutes that have been interpreted, any reference to "majority" and "minority" rules is meaningless, and (2) because so many of the other state statutes cited by Petitioner deal with service upon the Director of the Division of Motor Vehicles in non-resident driver cases. Such rules of service, applicable only in motor vehicle cases, reflect an idiosyncratic policy decision and are not a logical foundation for extrapolation into other areas of the law.

The decision of the Third Circuit Court of Appeals further underscores the significance of carefully examining the statute itself, rather than adopting the tortured re-working of the statute urged by Petitioner. Judge Garth noted that:

> ...the tolling provision speaks of individuals who "represent" rather than just "act" for the foreign corporation in New Jersey. By contrast, the applicable Court rules of service speak only of "servants" who merely "act" in New Jersey. See *N.J. Court Rule* 4:4-4 (c)(1). It appears to us, therefore, that the statutory tolling provision contemplates a much more significant corporate figure or presence — one capable of "representing" the corporation — than does the service rule. This higher standard, which requires "representation" in New Jersey, before a foreign corporation can receive the benefits of the limitation statute, comports with the original purpose of the Tolling Rule: to permit plaintiffs who have causes of action against foreign corporate defendants, which are not represented in New Jersey, to maintain the viability of their actions despite the passage of time. Moreover, this purpose is consistent and comparable with New Jersey's policy of liberally construing the limitation statute so as to preserve, wherever possible, a plaintiff's opportunity to litigate his claim on the merits. *Cohn, supra,* Petitioner's Appendix, p. 17a (emphasis added).

"Represented" cannot be ignored as Petitioner urges and the

significance of the word "represented" in the New Jersey tolling statute cannot be underestimated. The goal of the State Legislature was to provide plaintiffs or their attorneys with access to defendants by contacting the New Jersey Secretary of State to determine whether or not that entity had designated an in-state agent for purposes of service of process. No showing has been attempted to prove that this is an impermissible objective.

Subpoint B — COURTS DO NOT INTERPOSE THEIR JUDGMENT FOR THAT OF THE STATE LEGISLATURE.

The New Jersey Legislature chose to draw a distinction between mere amenability to service of process under the long-arm rule and actual representation within the State. Such legislative distinction has been upheld as rational in the instant case, in *Velmohos, supra,* and in *Hopkins v Kelsey-Hayes, Inc., supra.* Now Petitioner seeks to have this Court strike the state statute because it believes that judges can write a statute more to Petitioner's liking. Such a determination would result in a collision of the authority of two branches of government and overturn the constitutionally established concept of separation of powers. *See e.g.* Judge Brotman's decision in *Hopkins v Kelsey-Hayes, Inc., supra,* at pp. 29a-30a of Respondents' Brief in Opposition to Writ of Certiorari. Courts do not sit as superlegislatures and are not to determine the wisdom, need or propriety of statutory law. *Griswold v Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 1680 (1965).

In *Velmohos, supra,* Justice Pashman responded to the argument of the Defendant therein that the Tolling Statute had become irrelevant and redundant by virtue of the existence of long-arm jurisdiction. In rejecting this argument, the Court acknowledged the weight that must be accorded a legislative enactment: "Defendant's position is unconvincing. It would require us to incorporate into the Tolling Statute changes in another area of the law, which were made after its passage." *Velmohos, supra,* Respondent's Appendix, p. 12a.

The New Jersey Tolling Statute was last amended in 1949, at which time the language was broadened to specifically encompass the corporate defendant. The amendment exempted from the Tolling Statute domestic corporations, as well as foreign corporations having representatives in the state. Justice Pashman, in *Velmohos,* following a discussion of the legislative history of the Tolling Statute, made note of the fact that the 1949 Amendment occurred four years after the landmark case of *International Shoe Machinery Company v Washington*, 326 U.S. 310 (1945). In that case, the United States Supreme Court held that a state's jurisdictional powers extend beyond its borders to reach those entities which have "certain minimum contacts" with the state. Thus, one cannot logically argue that the New Jersey Legislature was unaware of the availability of long-arm jurisdiction in 1949:

> The legislature must be presumed to have been aware of this development when it acted to remove only represented corporations from the Tolling Provisions of *N.J.S.A.* 2A:14-22. In the absence of legislative action, expressly incorporating the amenability to long-arm service as an exemption from the Tolling Statute, that class of foreign corporations remains subject to its effect. *Velmohos, supra,* Respondents' Appendix, p. 14a.

Thereafter, in 1958, the New Jersey Supreme Court chose to promulgate a long-arm service rule, *R.* 4:4-4 (c)(1). This rule was intended as a corollary to, and not a displacement of, the legislative enactment embodied in the Tolling Provision, as amended in 1949. Judicially-created implied repealers have been continuously rejected by this Court.

Among the many reasons why a legislative enactment has such a strong presumption of validity, is the fact that once such an enactment becomes the law of the state, it is presumed that affected persons are cognizant of it and abide by it. Therefore, given the long standing rule of separation of powers, and further taking into account the reluctance of the judiciary to tamper with statutory expressions of legislative intent, it is

evident that only in the most extreme cases of legislative abuse should a court act to render such a statute unconstitutional. Further, given the highly rational basis for enactment of the New Jersey Tolling Provision, especially with respect to non-represented foreign corporations, and giving credence to the legislative history which clearly contemplates the existence of long-arm jurisdiction at the time that *N.J.S.A.* 2A:14-22 was amended in 1949, the Tolling Provision is neither irrational, nor vague nor ambiguous. As such, it should remain intact.

If the Tolling Provision is now found to be unconstitutional, the reliance placed thereon by Respondents will result in the dismissal of a cause of action having not only great personal value, but societal value as well. Petitioner has argued throughout the course of these proceedings that the delay in filing the instant action has caused it prejudice; yet, no proof of such has been forthcoming. Indeed, the longest time period involved in the within case stems from the fact that the medical knowledge linking the high doses of hormones in Petitioner's product with severe physical side effects was not in existence at the time of Mrs. Cohn's stroke. Respondents' reliance upon the efficacy of the Tolling Provision is justified. The damage which would result to Respondents due to that reliance, were the Court to find the statute unconstitutional, is abundant and clear.

POINT II

THE NEW JERSEY TOLLING STATUTE, *N.J.S.A.* 2A:14-22 IS A CONSTITUTIONALLY VALID LEGISLATIVE ENACTMENT UNDER THE DUE PROCESS, EQUAL PROTECTION AND COMMERCE CLAUSES OF THE CONSTITUTION OF THE UNITED STATES AND IS RATIONALLY RELATED TO A CONSTITUTIONALLY PERMISSIBLE GOAL.

Respondents herein respectfully submit that *N.J.S.A.* 2A:14-22, the New Jersey Tolling Statute, is constitutionally valid pursuant to the Due Process, Equal Protection and Commerce Clauses of the United States Constitution. Therefore, the validity of said statute should be sustained. The United States Court of Appeals for the Third Circuit below and the New Jersey Supreme Court, *Velmohos, supra,* have decreed that the rational basis of the New Jersey Tolling Statute meets constitutional standards and furthers constitutionally permissible objectives.

Subpoint A — THE TOLLING PROVISION SURPASSES THE REVIEW STANDARD OF "MINIMUM SCRUTINY", FURTHERS A LEGITIMATE STATE OBJECTIVE, AND SATISFIES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION.

The Tolling Statute under consideration involves neither a fundamental interest nor a suspect classification. *See: Lemke v Bailey*, 41 N.J. 295, 196 A.2d 523 (1963). In fact, as noted by the Court below, Petitioner has conceded this. Moreover, as stated in n. 12 of the opinion of the Court of Appeals at p. 18a of Petitioner's Brief for a Writ of Certiorari, such a concession would seem to be compelled by *Campbell v Holt*, 15 U.S. 620 (1885). Thus, the standard of review for the statute is that it must survive minimum constitutional scrutiny and be "rationally

related to a constitutionally permissible purpose". The pertinent observation that the nature, extent and duration of the privilege legislatively created by a statute of limitations is embodied in *Chase Securities Corp. v Donaldson*, 325 U.S. 304 (1945):

> They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable [sic] and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shield has never been regarded as what is now called a "fundamental" right or what used to be called a "natural right of the individual". *Chase Securities*, at p. 314.

On this basis, it is clear that the proper standard of review for the challenge to New Jersey's Tolling Statute, is the "rational basis" test. *Velmohos, supra*, and *Chase Securities, supra*. Petitioner must fully overcome the substantial burden of proving that the statute is irrational:

> In reviewing a state statute or constitutional provision under either the Due Process or Equal Protection clause, a court must determine if the provision rationally furthers any legitimate state objective. "For these purposes, it is of course, constitutionally irrelevant whether this reasoning in fact underlied the legislative decision . . ." *Flemming v Nestor*, 363 U.S. 603, 612 (1960). The Court might even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack. See *Weinberger v Salfi*, 422 U.S. 749, 780 (1975); *Williamson v Lee Optical Inc.*, 348 U.S. 483, 487-490 (1955); *Trafelet v Thompson*, 594 F.2d. 623, 626 (7th Cir.), Cert. denied, 48 U.S.L.W. 3239 (Oct. 1, 1979). *Cohn, supra*, at Petitioner's Brief for a Writ of Certiorari, at p. 19a., quoting *Malmed v Thornburgh*, 79-2467, slip opinion at 7, (3rd Cir., May 13, 1980) (Aldisert, J.) (emphasis in original).

Judge Garth of the United States Third Circuit Court of Appeals and Justice Pashman of the New Jersey Supreme Court

in *Velmohos, supra,* laid to rest Petitioner's contention that no basis exists for delineating between corporations represented in New Jersey and foreign corporations without a representative for purposes of service of process:

> This distinction between represented and non-represented foreign corporations reflects the pragmatic difficulties which may be encountered by plaintiffs suing foreign corporations. Since service of process under the long-arm statute is more difficult and time-consuming to achieve than service within the state, and since out-of-state, non-represented corporate defendants may be difficult to locate let alone serve, tolling the statute of limitations protects New Jersey plaintiffs and facilitates their lawsuits against such defendants. Because the tolling provision fulfills the legitimate state purpose of easing the special burdens of suits against non-represented foreign corporations, we cannot say that the distinction which it recognizes is irrational. *Cohn, supra,* Petitioner's Appendix, p. 23a; *Accord: Hopkins, supra.*

The rationale behind the Legislature's desire to preserve the Tolling Provision in the face of the advent of long-arm jurisdiction is clear: Notwithstanding the fact that some New Jersey litigants may be able to locate and effectively serve process upon large, well-known foreign corporations pursuant to long-arm service, a plaintiff's task of effecting process is facilitated by the designation of a proper corporate representative within the state. But the necessity of the Tolling Provision is most convincingly demonstrated by those cases in which the foreign corporation cannot be located at all or not for a very long period of time, rendering the long-arm rule wholly impotent. It would be of little comfort to the injured party to learn that having found its "unrepresented defendant" long-arm service was unavailable because the Statute of Limitations barred his or her suit. The physical location of some out-of-state corporations cannot be ascertained regardless of the measures taken by an aggrieved party, and in those instances, the Tolling Provision is essential in preserving causes of action and denying secreted defendants immunity from answering for their actions.

Even with the judicial creation of the long-arm service rule, a valid, rational basis exists for distinguishing between represented and non-represented foreign corporations. Among such foregn corporations, there are degrees of difficulty in effecting service, if indeed, service can be made at all. This constitutes an independent rationale of the New Jersey State Legislature. *Velmohos, supra.* Petitioner's argument that the New Jersey Tolling Statute violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution must fail. The Equal Protection Clause does not require that statutes be drawn with mathematical nicety. *Cleveland v National College of Business*, 435 U.S. 213, 221 (1978). Therefore, because it acted within the scope of its authority and because it evidenced valid objectives, the New Jersey Legislature's Tolling Provision is rationally related to a constitutionally permissible purpose.

Subpoint B — THE STATUTE IS CONSTITUTIONAL BECAUSE THE STATE'S INTERESTS ARE SUBSTANTIAL, THE BURDENS ON NON-RESIDENT CORPORATIONS ARE NEGLIGIBLE AND THE BURDENS ON INTERSTATE COMMERCE ARE NON-EXISTENT.

The inability to raise the defense of Statute of Limitations is not the type of impermissible burden on interstate commerce which this Court has heretofore condemned. Petitioner has not presented a scintilla of evidence that the lack of the availability of the defense of the Statute of Limitations has in any manner affected its capacity to engage in interstate commerce. Nor have its business decisions been in any way influenced by the New Jersey Tolling Provision. Obviously, the New Jersey Legislature recognizes the federal limitation on the ability of the States to

impose burdens on a foreign corporation's in-state activities while conducting interstate commerce.[2]

Petitioner asks that this Court believe that in those instances where a non-represented, foreign corporation is denied the defense of the Statute of Limitations, it is denied the use of all other available privileges of New Jersey law. This is just not so. If a plaintiff's delay is inexcusable and results "in prejudice to the defendant, the latter may raise the equitable defense of laches to bar the claim".[3]

In those instances in which this Court has struck down state statutes on Commerce Clause grounds, it has been because either (a) there existed a need for national uniformity in a given subject or (b) the state statute constituted economic protectionism and furthered no valid state interest. "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Cooley v Board of Wardens,* 53 U.S. 299, 319 (1951). Where national uniformity is not required, such as the specific extent and duration of the privilege embodied by the various Statutes of Limitations, or such as the standards encompassed in divorce law, the field is a proper one for state legislation. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden

---

[2] *N.J.S.A.* 14A:13-11(2) recognizes that a foreign corporation need not qualify in order to engage in interstate commerce. This statute provides: "The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this State." *N.J.S.A.* 14A:13-3(2) provides that a corporation may act in the State, engage in interstate commerce, maintain, defend, participate in any action or proceedings, judicial, administrative, arbitrative, or otherwise; hold meetings of directors or shareholders; continuously maintain bank accounts and borrow money, maintain offices or agents to handle securities, etc. and still not be required to obtain a Certificate of Authority from the State of New Jersey.

[3] *Velmohos, supra,* at Respondent's Brief in Opposition, p. 14a, n. 10.

imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In the instant case, Petitioner cannot cite even one burden on interstate commerce arising as a result of the application of this statute, because none exist. Indeed, it has operated freely in New Jersey for many years, selling its products and earning its profits. Since there is no requirement for an out-of-state corporation to obtain a Certificate of Authority in New Jersey,[4] all the alleged burdens cited by Petitioner are inapplicable. Nowhere does Petitioner evidence any impact upon its ability to operate in the New Jersey market as a direct result of the application of the Tolling Provision.

When construing the validity of a state statute in light of a challenge under the Commerce Clause, the burden of proof of invalidity is necessarily upon the party attacking the statute. State statutes are of "equal dignity" when measured with the Commerce Clause. *Bibb v Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). Not all burdens upon commerce, but only undue or discriminiatory ones, are forbidden by the Commerce Clause of the Federal Constitution. *Breard v City of Alexandria, La.*, 341 U.S. 622; Rehearing denied, 342 U.S. 843 (1951). By being unable to invoke the protection of the Statute of Limitations and having to rely upon the defense of laches, the only consequence befalling a non-represented foreign corporation is a possible dimunition in its opportunity to escape accountability for its actions. This alleged consequence is not commerce related.

Petitioner argues that the Tolling Provision is per se invalid because it constitutes a "substantial, direct or unjustified" burden. But no such burden has been demonstrated. Furthermore, the cases and authorities upon which Petitioner relies are inapplicable to the matter before this Court. The line of authority urged by Petitioner involves instances in which states have sought affirmatively to prevent foreign corporations from

[4]See *N.J.S.A.* 14A:13-11(2) and *N.J.S.A.* 14A:13-3(2) on page 23 above.

engaging in interstate commerce within the state. By contrast, New Jersey's Tolling Provision does not seek to, nor does it have the effect of, limiting any commercial activity whatsoever. In fact, a foreign corporation may relieve itself of the effects of the statute merely by appointing an agent within the state to accept service of process. This is the state of the law in New Jersey. See Justice Pashman in *Velmohos, supra,* Respondents' Brief in Opposition to Certiorari, at p. 14a, n. 10 and New Jersey Rules of Court, *R.* 4:4-4 (c)(1). (Petitioner's Brief at p.6).

All of the cases cited by Petitioner in support of its per se theory, involve affirmative attempts by states to restrict trade, as in the "drummer" cases. *Sioux Remedy Co. v Cope,* 235 U.S. 197 (1914) involved a South Dakota provision affirmatively preventing a foreign corporation from bringing suit within the state, to collect payment on a contract made with a citizen of the state and pursuant to which goods were delivered into the state, unless the foreign corporation rendered itself amenable generally to suit there. The difference in impact between the subject Tolling Provision and the statute in *Sioux Remedy* is that the latter deprives a foreign corporation of an affirmative right necessary to the proper conduct of interstate commerce, that being the right to enforce a contract, while the Tolling Provision does not result in any restriction upon the capacity to do business. Moreover, the Court in *Sioux Remedy* determined that the South Dakota law bore "no natural or reasonable relation to the right to sue". By contrast, the Tolling Provision is, by its nature, intimately connected with the Statute of Limitations and service of process, thereby furthering the objectives, cited above, of the New Jersey Legislature. The Tolling Provision is merely a limitation upon the privilege conferred by the State Legislature.

Allenberg Cotton Co. v Pittman, 419 U.S. 20 (1974) upon which Petitioner also relies, involved an affirmative attempt by the State of Mississippi to deny a foreign corporation access to its courts to enforce a contract. *Allenberg* held only that "Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the

Constitution." *Allenberg, supra,* p. 35. This case, like *Sioux Remedy*, simply has no bearing on the case at hand. No fundamental aspect of litigation, let alone interstate commerce, is impaired by application of the Tolling Provision. The statute under attack in the instant case preserves access to the judicial process, as opposed to the effect of the statute in *Allenberg*, which was to deny access.

The benefits provided by the Tolling Provision to the citizens of New Jersey are substantial and clearly outweigh any alleged burdens mentioned by Petitioner. Both the New Jersey Supreme Court in *Velmohos, supra,* and the Court of Appeals, below, utilized a "balancing test" in evaluating the statute's benefits to the citizens of New Jersey and its impact on interstate commerce. Among these significant benefits are the following:

1. An acknowledgment of the difficulty of locating certain out-of-state defendants, because they are either circumstantially or intentionally secreted from the view of a potential New Jersey plaintiff.

2. An understanding of the degrees of difficulty involved with service of process; even in those instances where a defendant can be located, a plaintiff has the burden of proving to a Court by affidavit that after diligent inquiry, no in-state representative is available and must also gather information to conclusively satisfy the Court that service of process under the long-arm rule is consistent with due process.

3. Avoidance of the necessity to set up an elaborate, alternative mechanism by which courts would be forced to determine on a case-by-case basis which out-of-state corporations are or are not amenable to long-arm service by a particular plaintiff. Each such determination would entail an evaluation of subjective criteria and would turn upon degrees of visibility of various corporations and levels of knowledge of the whereabouts of a corporation by a plaintiff.

4. Establishing protection for New Jersey litigants from foreign corporations which may commit torts within the State and which may be secreted from the view of the aggrieved party.

5. Public policy reasons, including adjudicating claims on their merits; preserving plaintiffs' causes of action; and fostering accountability of the corporate defendant. This rationale is particularly appropriate in the instant case. These benefits easily outweigh any alleged burdens claimed by Petitioner.

The so-called "burden" claimed by Petitioner to be created in the instant case is not by nature or by degree the type condemned historically by this Court as an over-stepping by a state legislature. Certainly no need for national uniformity with respect to the nature, extent and duration of statutes of limitations is apparent. The burden Petitioner claims to have been erected by the application of the Tolling Provision is not of the category or degree acknowledged by this Court to date. The Court has struck down regulations where they either interfere with a corporation's capacity to engage in inter-state commerce or amount to mere economic protectionism by a state. Instances include: *Southern Pacific Co. v Arizona*, 325 U.S. 761, (1945) (a state regulation prohibiting trains with more than a certain number of cars interferes with commerce beyond any demonstrated safety interest); *Pike v Bruce Church, Inc.*, 397 U.S. 137 (1970) (Arizona statute to force growers to pack cantaloupes in-state invalid as furthering no valid state interests and amounting to economic protectionism). However, where a negligible impact arises, this Court has upheld state statutes as not creating impermissible burdens, such as where a statute required a motor carrier to obtain a license to transport interstate. See *Lloyd Fry Roofing Co. v Wood*, 344 U.S. 157 (1952).

Petitioner argues that if it chose to obtain a Certificate of Authority in New Jersey, it would be subject to all types of foreign actions. This line of attack by Petitioner is without substance in light of the "minimum contacts" test of *International Shoe Co. v Washington*, 326 U.S. 310 (1945). Denial of the privilege of the Statute of Limitations is not tantamount to denial of due process in New Jersey as urged by Petitioner. Litigants from other states cannot take advantage of the Tolling

Provision in New Jersey law if their state statutes bar suit. In addition to the "minimum contacts" test, the principles of *H.J. Govan vs Trade Bank and Trust Co.*, 109 N.J. Super 271, (N.J. App. Div. 1970) and *Marsh v Davis*, 99 N.J. Super 130 (1968) still apply. Therefore, the application of the Tolling Provision is limited to those instances in which the cause of action arose in New Jersey or the aggrieved party is a New Jersey resident. See also: *Zwillenberg v Post*, 293 F.2d 199 (3rd. Cir. 1961). Therefore, Petitioner's argument that it will be subject to foreign causes of action must fail.

Thus, the subject statute in no way restricts the ability of Petitioner to engage in interstate commerce. The evidence of the continuous vitality of Petitioner's business activities within the State of New Jersey to this very day is the most powerful refutation of Petitioner's arguments. The Tolling Provision in no way impacts upon Petitioner's capacity to engage in interstate commerce within the State of New Jersey, nor does it violate any provision of the United States Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the United States Court of Appeals for the Third Circuit be affirmed, and that this matter be remanded to the Federal District Court for the District of New Jersey in order that the trial on the merits might proceed.

Respectfully submitted,

WALTER R. COHN
15 Valley Street
South Orange, New Jersey 07079
(201) 762-6444
Attorney for Respondents

September 21, 1981

Office - Supreme Court, U.S.
FILED
NOV 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

G.D. SEARLE & COMPANY,

Petitioner,

vs.

SUSAN COHN and WALTER COHN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

WILLIAM P. RICHMOND
DAVID W. CARPENTER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

RAYMOND M. TIERNEY, JR.
MICHAEL P. MURPHY
SHANLEY & FISHER
550 Broad Street
Newark, New Jersey 07102
(201) 643-1220

Attorneys for Petitioner

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
I.	The New Jersey Tolling Statute Imposes An Undue, Discriminatory, And Impermissible Burden On Interstate Commerce	1
	A. *Per Se* Invalidity	2
	B. Impermissible Discrimination And Excessive Burden	6
II.	The Only Way Unregistered Foreign Corporations Can Obtain The Benefit Of The Statute Of Limitations Is To Submit To A Licensing Scheme And Generally Consent To Suit In New Jersey	8
	A. Submission To A Licensing Scheme Is The Only Way Of Registering An Agent In New Jersey	9
	B. In Any Event, New Jersey Law Improperly Conditions The Availability Of The Statute Of Limitations On A Corporation's General Consent To Suit In The State	11
CONCLUSION		13

TABLE OF AUTHORITIES

CASES

	Page
Adam v. *Saenger*, 303 U.S. 59 (1938)	11
Allenberg Cotton Co. v. *Pittman*, 419 U.S. 20 (1974)	2, 3, 5, 9
Davis v. *Farmers' Co-operative Equity Co.*, 262 U.S. 312 (1923)	11
Eli Lilly & Co. v. *Sav-On-Drugs*, 366 U.S. 276 (1961)	2
Exxon Corp. v. *Governor of Maryland*, 437 U.S. 117 (1978)	4
Great Atlantic & Pacific Tea Co. v. *Cottrell*, 424 U.S. 366 (1976)	6
Grow Farms Corp. v. *National State Bank*, 167 N.J. Super. 102, 400 A.2d 535 (1979)	5
Hughes v. *Oklahoma*, 441 U.S. 322 (1979)	6, 7
Hunt v. *Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977)	4, 6, 7
International Shoe Co. v. *Washington*, 326 U.S. 310 (1945)	9, 11
International Text-book v. *Pigg*, 217 U.S. 91 (1910)	3
Lewis v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980)	6, 7
Litton Industrial Systems, Inc. v. *Kennedy Van Saun Corp.*, 117 N.J. Super. 52, 283 A.2d 551 (Law Div. 1971)	11, 12
National Equipment Rental, Ltd. v. *Szukhent*, 375 U.S. 311 (1964)	11

	Page
Neirbo Co. v. *Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165 (1939)	11
Pennsylvania Fire Ins. Co. v. *Gold Issue Mining Co.*, 243 U.S. 93 (1917)	11
Philadelphia v. *New Jersey*, 437 U.S. 617 (1978)	8
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970)	2, 8
Scanapico v. *Richmond, F.&P. R.R. Co.*, 439 F.2d 17 (2d Cir. 1970)(en banc)	11
Shaffer v. *Heitner*, 433 U.S. 186 (1977)	8
Sioux Remedy Co. v. *Cope*, 235 U.S. 197 (1914)	2, 3
United States v. *Kubrick*, 444 U.S. 111 (1979)	4
Velmohos v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980)	9, 10
Western & Southern Life Insurance Co. v. *State Board of Equalization*, ___ U.S. ___, 49 U.S.L.W. 4542 (May 26, 1981)	3
World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980)	5

MISCELLANEOUS

New Jersey Ct. R. 4: 4-4(c)	9
New Jersey Statutes Annotated, 14A:4-1	3
14A:4-5	3
14A:13-1 *et seq.*	9
14A:13-2	3
54: 10A-2	3

No. 80-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

G.D. SEARLE & COMPANY,

Petitioner,

vs.

SUSAN COHN and WALTER COHN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

I. The New Jersey Tolling Statute Imposes An Undue, Discriminatory, And Impermissible Burden On Interstate Commerce.

Under the New Jersey tolling statute, foreign corporations that are not "doing business" in New Jersey and that have thus not registered agents in the State are prohibited from *ever* raising the defense of the statute of limitations. In contrast, domestic New Jersey corporations, corporations that qualify to "transact business" in New Jersey, and essentially all other litigants are permitted this defense.

As Searle demonstrated in its opening brief, this anomaly violates the Commerce Clause for three independent reasons.[1] First, it burdens Searle's federally protected right not to register

[1]Searle's opening brief further demonstrated that the tolling statute violates the Due Process and Equal Protection Clauses. Pet. Br. 29-34.

(Footnote continued on following page.)

in New Jersey and is *per se* invalid. Second, it unjustifiably discriminates against interstate commerce, contrary to a long line of decisions of this Court. Third, the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Respondents have offered no response to these arguments. Indeed, their principal claim is the startling contention (Resp. Br. pp. 22-28) that for New Jersey to deny its statute of limitations to out-of-state corporations *alone* does not interfere with interstate commerce at all.

A. *Per Se* Invalidity.

New Jersey's registration requirement and tolling provision constitutes precisely the kind of undue and discriminatory burden on interstate commerce that this Court has repeatedly held to be *per se* invalid. Foreign corporations that are engaged exclusively in interstate commerce have a federal constitutional right to be free of licensing schemes or requirements that the corporation "render[s] itself amenable to suit in all the courts of the State by whosoever chooses to sue it there." *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197, 205 (1914); see also, *Eli Lilly & Co.* v. *Sav-On-Drugs*, 366 U.S. 276, 278-79 (1961).[2] *A fortiori*, states cannot

(Footnote continued from previous page.)
There is no reason to repeat these arguments here, however, because respondent's sole response to them has been to misstate them. Resp. Br. pp. 19-20. Searle's claims are *not* premised on any notion that States do not have discretion in determining limitations periods. Searle does not contend that it is unconstitutional for a State to establish a two year limitation period for personal injury suits and to provide that the limitations period does not begin to run until the plaintiff could reasonably have discovered the cause of action. Searle's claim rather is that it violates the Fourteenth Amendment for a State to refuse to extend the benefit of this statute of limitations to foreign corporations like it, which are indisputably subject to long arm jurisdiction in proper cases.

[2]As this Court has repeatedly recognized, it would profoundly impede the functioning of the national marketplace if States could burden interstate corporations engaged in exclusively interstate commerce with whatever regulatory requirements they may devise for domestic businesses.

penalize such corporations by enacting discriminatory legislation designed to coerce them into relinquishing this federal constitutional right. See, *e.g.*, *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974). This Court has consistently held that states may not deny these corporations important rights in litigation that are available to all other litigants or otherwise penalize them. *Ibid*; *International Text-book* v. *Pigg*, 217 U.S. 91 (1910); see also *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, ___ U.S. ___, 49 U.S.L.W. 4542, 4544-47 (May 26, 1981) (States cannot force even foreign corporations "doing business" in a state to relinquish federal constitutional rights).

Yet the New Jersey tolling statute effects precisely such discrimination. It denies the benefit of its statute of limitations to foreign corporations, like Searle, that indisputably have a right not to register an agent and thereby consent to suit in the State by whosoever chooses to sue it there. Moreover, as the District Court and respondents recognized below (Cert. Pet. 44a-45a n.17), the only procedure by which foreign corporations like Searle can register an agent in New Jersey is to qualify to do business and submit itself to New Jersey's licensing scheme.[1]

Respondents' attempt to justify this departure from established principles lacks any substance. Their main contention (Resp. Br. p. 25) is that there is a fundamental "difference in [the] impact" of the New Jersey tolling statute and the statutes invalidated in *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974), *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197 (1914), and like cases. Respondents point out that the statutes in these cases had denied unregistered interstate corporations the privilege of access to state

[1]For example, by obtaining a certificate of authority a foreign corporation automatically becomes required, *inter alia*, to maintain a registered business office, N.J.S.A. §14A: 4-1 (West 1981 Supp.); to file annual reports with the New Jersey Secretary of State, *id.*, §14A:4-5 (West 1981 Supp.), to pay New Jersey franchise tax. *Id.*, §54:10A-2 (West 1981 Supp. & N.J.Ad. Code §18:7-1.6 (1979 Supp.), and to assume whatever other duties are hereafter imposed on domestic corporations. N.J.S.A. §14A:13-2.

courts to sue on their contracts. In respondents' view, this constituted the denial of "an affirmative right necessary to the proper conduct of interstate commerce." Resp. Br. p. 25. In contrast, respondents argue that to deny unregistered foreign corporations a dispositive statute of limitations defense is not "by nature or by degree" the "type" of interference with interstate commerce "condemned historically by this Court" (Resp. Br. p. 27). There is no merit to this argument.

First, denying the statute of limitations to unlicensed foreign corporations imposes a more severe discriminatory burden on interstate commerce than does the denial of the privilege of filing suit in state court. The denial of the statute of limitations to unlicensed foreign corporations absolutely denies them the benefits of repose that the statute affords all other litigants.[4] The inevitable consequence is that nonregistered foreign corporations must incur the "added costs" of defending suits and, in some instances, of paying judgments when domestic New Jersey businesses and all other litigants would have the right to have the suit dismissed on summary judgment. See *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 351 (1977); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 127 (1978). This is a far more significant financial burden on Searle than would be the denial of the right to sue on contracts in New Jersey—which would have only a *de minimis* effect on a corporation like

[4]In *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979), this Court emphasized the paramount importance of statutes of limitations to defendants and to our systems of jurisprudence:

> "Statutes of limitations, which 'are found and approved in all systems of enlightened jurisprudence,' *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'* * *We should regard the plea of limitations as a 'meritorious defense, in itself serving a public interest.' *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938)."

Searle.[5] Moreover, the tolling statute will make unregistered foreign manufacturers like Searle set aside contingency funds in perpetuity, disrupting their financial planning and having profound effects on their nationwide and worldwide operations.

Second, any manufacturer in the United States or the world —even ones that would never have any occasion to bring suit in New Jersey—is a potential defendant in a products liability suit in New Jersey if it is reasonably forseeable its products would end up there. *Cf. World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). Thus, the New Jersey tolling statutes will affect the fiscal obligations and contingency planning of out-of-state companies that would never have any occasion to bring suit in New Jersey. It will force corporations to register in New Jersey if there is even a remote possibility it could some day be sued there, thereby having a far more profound disruptive effect on the national marketplace than denial of the right to sue.[6]

Finally, the most fundamental defect in respondents' contention is that it ignores that the basis of *Allenberg* is that States cannot impose discriminatory burdens on foreign corporations for

[5]Because Searle is not engaged in intrastate business in New Jersey, it would not be limited to a New Jersey forum for vindicating its rights. It executes its contracts for New Jersey sales in Skokie, Illinois and other locations outside New Jersey and ships products f.o.b. its place of business. It would plainly have non-New Jersey forums available if contract disputes arise. In any event, it could insert forum selection clauses into its sales contracts to assure access to any particular non-New Jersey forum. The added cost of the statute invalidated in *Allenberg* on Searle could ordinarily only be the very minor ones incidental to bringing suit in a slightly less convenient forum than New Jersey.

[6]The tolling statute's interference with interstate commerce is exacerbated by the fact that even when a corporation registers an agent, it only commences the *running* of the two year statute of limitations. Out-of-state businesses will be subject to suit on stale claims for two years even if they register today. In contrast, registration removes any disability on the filing of suits immediately. See, *e.g.*, *Grow Farms Corp.* v. *National State Bank*, 167 N.J. Super. 102, 400 A.2d 535 (1979).

exercising their federal constitutional rights. If respondents were correct that States can withdraw all privileges from foreign corporations except access to court as a plaintiff, the principle could not be contained. If New Jersey can deny the statute of limitations to foreign corporations, it also could create different discovery rules, evidentiary rules, or remedial rules for foreign corporations. The possibility of such anomalies illustrates why states may not use any means whatever to force corporations to relinquish their federal constitutional rights.

B. Impermissible Discrimination And Excessive Burden.

Even apart from its effect of coercing the relinquishment of federal constitutional rights, New Jersey's denial of the statute of limitations to unregistered corporations not "doing business" in New Jersey is precisely the kind of discrimination against interstate commerce[7] that this Court has repeatedly held to be invalid. See, *e.g.*, *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980); *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979); *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 351 (1977); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976).

As in *Lewis*, Searle need not argue or demonstrate that the discrimination is so flagrant that the statute is invalid *per se*. See *Lewis*, *supra*, 447 U.S. at 42. When a statute discriminates against interstate commerce, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate

---

[7]Any statute that distinguishes between interstate and local concerns and "discriminates *among* affected business entities according to the extent of their contacts with the local economy" or that imposes added costs on out-of-state corporations alone discriminates against interstate commerce within the Commerce Clause. See *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 42 (1980) (emphasis in original); *Hunt* v. *Washington Apple Advertising Comm'n*, *supra*, 432 U.S at 352.

to preserve the local interests at stake." *Hunt, supra*, 432 U.S. at 353; see *Hughes* v. *Oklahoma, supra*, 441 U.S. at 336-338. Neither respondents nor the state has met this burden. There simply is no permissible local benefit flowing from the statute that could not be readily achieved by less discriminatory and less burdensome means.

The original purpose of the tolling statute was to preserve the claims of a New Jersey plaintiff against a foreign corporation when New Jersey could not obtain *in personam* jurisdiction over the corporation. To the extent this problem once existed, it now has been solved in New Jersey—as it has in virtually every other state in the country—by the adoption of rules permitting long arm jurisdiction.[8] There is no doubt that long arm jurisdiction is a less burdensome alternative to the indefinite tolling of the statute of limitations.

Searle has already demonstrated that the other putative local interests identified by the Court of Appeals (Cert. Pet. 22a-24a) are palpably insufficient to justify the tolling statute's discriminatory burden on interstate commerce. Pet. Br. pp. 26-28. Each legitimate local benefit could be achieved by nondiscriminatory means or, in any event, by the adoption of "intermediate" means far short of *indefinitely* denying out-of-state corporations the statute of limitations. Pet. Br. pp. 26-28; see *Lewis, supra*, 447 U.S. at 43.

Respondents further defend the tolling statute on the ground it promotes "public policy reasons" including "adjudicating claims on the merits, preserving plaintiffs' causes of action, and fostering [maximum] accountability of a corporate defendant." Resp. Br. pp. 26-27. These are legitimate local interests. It is elementary,

[8]Nearly every other state has thus held, as a matter of state law, that comparable tolling statutes are inapplicable where, as here, the out-of-state corporation is subject to long-arm jurisdiction. See Cert. Pet. 49a n.21; J. App. 18a-25a.

however, that States may not place the burden of attaining such public policies on out-of-state companies alone. See, *e.g.*, *Philadelphia* v. *New Jersey*, 437 U.S. 617, 628 (1978). If a State wishes to abolish its statute of limitations to promote these goals, it must do so even-handedly with respect to in-state and out-of-state business alike and abolish the limitations defense in *all* cases.

Like the Court of Appeals, respondents also defend the Tolling Statute on the ground it will force out-of-state corporations to register agents and thereby consent generally to suit in New Jersey. This, respondents contend (Resp. Br. p. 26), will avoid "the necessity to set up elaborate, alternative mechanisms by which courts would be forced to determine on a case by case basis which out-of-state corporations are or are not amenable to long-arm service by a particular plaintiff." This Court has held, however, that any State interest in relieving plaintiffs of the obligation of establishing jurisdiction under the fairness standard of the Due Process Clause and thus simplifying litigation for the plaintiff and the Court is illegitimate *per se*. *Shaffer* v. *Heitner*, 433 U.S. 186, 211 (1977); Pet. Br. p. 25.

In any event, because none of the putative local interests are possibly sufficient to justify any interference with interstate commerce, the burden on commerce is clearly excessive. See *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

II. The Only Way Unregistered Foreign Corporations Can Obtain The Benefit Of The Statute Of Limitations Is To Submit To A Licensing Scheme And Generally Consent To Suit In New Jersey.

Finally, respondents seem to attempt to avoid Searle's Commerce Clause claims by contending, contrary to their position below, that it is the law of New Jersey that foreign corporations can register agents in New Jersey and obtain the benefit of the

New Jersey statute of limitations *without* submitting to a licensing scheme (Resp. Br. p. 12) and *without* consenting to suits that could not otherwise be brought in New Jersey courts under the test of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).[9] These claims lack any substance. But even if these claims were valid, they could affect only *one* of Searle's claims: the applicability of the principle of *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974).

A. Submission To A Licensing Scheme Is The Only Way Of Registering An Agent In New Jersey.

First, as the District Court indicated (Cert. Pet. 44a-45a n.17), there is only one procedure available under New Jersey law to register an agent to accept service of process and become "represented" in New Jersey for purposes of the New Jersey tolling statute: filing a "certificate of authority" to "transact business" and thereby submitting the corporation to New Jersey's comprehensive licensing scheme. N.J.S.A. §§ 14A:13-1 *et seq.* The legislative history of the tolling statute quoted by the New Jersey Supreme Court in *Velmohos* makes this absolutely clear, for it states that the statute was intended to extend the benefit of the statute of limitations to "foreign corporations *licensed to do business* in New Jersey." *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 290, 416 A.2d 372, 376-77 (1980), *quoting* Statement Accompanying New Jersey Assembly Bill No. 467 (1949) (empha-

[9] Contrary to respondents' claim (Resp. Br. pp. 15-16), Searle has *not* challenged the Court of Appeals' holdings (1) that the meaning of the tolling statute is that a foreign corporation must have an officer in the State or a registered agent with the Secretary of State in order to claim the benefit of the limitations defense and (2) that the fact that Searle's New Jersey detailmen are unquestionably "servants" acting in New Jersey who may be served with process under N.J. Ct. Rule 4:4-4(c) is *not* sufficient to avoid the tolling statute. Cert. Pet. 15a-17a. However, if this Court is going to consider any issues of New Jersey law raised by respondents, Searle believes it should also consider the correctness of the Court of Appeals' holding on the detailmen issue because the New Jersey Supreme Court has never approved it.

sis added). Indeed, respondent has heretofore argued that the purpose of the tolling statute is to "induce licensure" by foreign corporations. Cert. Pet. 44a n.17. Respondents recognized below that licensing is the only way plaintiffs can be assured "access to defendants by contacting the New Jersey Secretary of State." See Resp. Br. p. 16.

In now contending that a foreign corporation *can* register an agent with the New Jersey Secretary of State without qualifying to transact business in New Jersey, respondents rely exclusively on the following statement from a footnote in the New Jersey Supreme Court's Opinion in *Velmohos*: "whatever hardship on foreign corporations might be caused by continued exposure can be easily eliminated by the designation of an agent for service of process within the State." 83 N.J. at 291 n.10, 416 A.2d at 378 n.10. However, there is nothing in this footnote that even remotely suggests that the New Jersey Supreme Court held—contrary to the very legislative history it quoted on the previous page of its opinion (83 N.J. at 290)—that agents can be designated by any means other than filing a certificate of authority. The New Jersey Court necessarily recognized that the means of avoiding the tolling statute is to follow the only existing procedure for registering an agent: qualifying to do business.

If there were any doubt on this matter, the agency of the State of New Jersey that is responsible for the registration of foreign corporations and their agents, the New Jersey Department of State, recently stated that it is its position that a foreign corporation must qualify to do business in New Jersey before it can designate a registered agent for services of process. See Letter of Frank Capece, Executive Assistant to the Secretary of State, to James Freis, dated October 22, 1981, reproduced in Appendix A to this Reply Brief.[10]

[10]The original of this letter has been filed with the Court.

B. In Any Event, New Jersey Law Improperly Conditions The Availability Of The Statute Of Limitations On A Corporation's General Consent To Suit In The State.

In any case, Searle has demonstrated that the New Jersey law would be a *per se* violation of the Commerce Clause even if there were a procedure for registering an agent without also qualifying to do business in New Jersey. This is because registration of an agent would, under established principles, constitute Searle's waiver of its rights under the Commerce[11] and Due Process Clauses not to be subject to suit in a State if the "minimum contacts" test of *International Shoe* is not satisfied.[12] Pet. Br. pp. 19-22.

Respondents now appear also to contend (Resp. Br. pp. 27-28) that Searle's appointment of an agent will not subject it to any suit in New Jersey which would not satisfy the test under the Due Process clause of "fair play and substantial justice." Respondents' argument is flatly contrary to the long line of decisions (see n.12 *supra*) holding that such consent is an independent ground for *in personam* jurisdiction, whether or not the minimum contacts test is satisfied.[13] This contention is further contradicted

[11]See *Davis* v. *Farmers' Co-operative Equity Co.*, 262 U.S. 312 (1923); *Scanapico* v. *Richmond, F. & P. R.R. Co.*, 439 F.2d 17, 25-26 (2nd Cir. 1970) (en banc) (Friendly, J.)

[12]*Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U.S. 93 (1917); *Neirbo Co.* v. *Bethlehelm Shipbuilding Corp. Ltd.*, 308 U.S. 165 (1939); *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311 (1964); *Litton Industrial Systems, Inc.* v. *Kennedy Van Saun Corp.*, 117 N.J. Super 52, 283 A.2d 551, 555-56 (Law Div. 1971); see *Adam* v. *Saenger*, 303 U.S. 59 (1938).

[13]Perhaps respondents are arguing that this Court or the New Jersey Supreme Court might someday overrule the earlier decisions and hold that the appointment of an agent is consent only where *in personam* jurisdiction is consistent with the "minimum contacts" test. However, that would eliminate one basis for the Court of Appeals' conclusion that the statute promotes local interests. Moreover, the possibility of future ac-

(Footnote continued on following page.)

by respondents' own argument (Resp. Br. p. 26) and the Court of Appeals' and New Jersey Supreme Court's holdings that a purpose of the tolling statute is to coerce consent to jurisdiction and thus spare plaintiffs the burden of proving that long arm jurisdiction is consistent with Due Process.[14]

(Footnote continued from previous page.)
tion would not eliminate the interference with interstate commerce. To require out-of-state corporations to register agents and then bear the burden of persuading courts that the appointment of an agent should not be treated as consent to all suits would impose added costs on out-of-state companies and thus impermissibly discriminate against interstate commerce.

[14]Respondents further contend (Resp. Br. p. 28) that registration of an agent will not broaden Searle's exposure to suit in New Jersey because "the application of the Tolling Provision is limited to [where] the cause of action arose in New Jersey or the aggrieved party is a New Jersey resident." This is a *non sequitur* and is simply wrong. There are many suits that New Jersey residents could attempt to bring against Searle in New Jersey that would not satisfy the minimum contacts test and that would be barred, absent consent. Pet. Br. pp. 23-24. Moreover, the scope of the tolling statute is irrelevant to the question of the consequences of the appointment of an agent. The rule in New Jersey is that such an appointment constitutes consent even when the suits are unrelated to New Jersey. *Litton Industrial Systems, Inc.* v. *Kennedy Van Saun Corp.*, 117 N.J. Super. 52, 283 A.2d 551, 555-56 (Law Div. 1971).

CONCLUSION

For the reasons stated in this Reply Brief as well as those in Petitioner's Opening Brief, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

WILLIAM P. RICHMOND
DAVID W. CARPENTER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

RAYMOND M. TIERNEY, JR.
MICHAEL P. MURPHY
SHANLEY & FISHER
550 Broad Street
Newark, New Jersey 07102
(201) 643-1220

Attorneys for Petitioners

November 1981

Appendix A

State of New Jersey
DEPARTMENT OF STATE
P O BOX 1330
TRENTON, NEW JERSEY 08625

FRANK CAPECE
ASSISTANT TO THE SECRETARY OF STATE

October 22, 1981

James H. Freis, Esq.
Shanley & Fisher
550 Broad Street
Newark, New Jersey 07102

Dear Mr. Freis:

In response to your recent letter, please be advised that it is the view of the Department of State that unless a foreign corporation has qualified to do business in New Jersey, they are unable to designate a registered agent for service of process.

Very truly yours,

Frank Capece
Executive Assistant
to the Secretary of State

FGC/vd

MOTION FILED
JUL 6 1981

No. 80-644

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

G.D. SEARLE & CO.,
Petitioner,
v.
SUSAN COHN AND WALTER COHN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR BRINCO MINING LIMITED AS AMICUS CURIAE

Of Counsel:
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

STEPHEN J. POLLAK*
I. MICHAEL GREENBERGER
FRANKLIN D. KRAMER
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Attorneys for Amicus Curiae Brinco Mining Limited
* Counsel of Record

Dated: July 6, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE	v
BRIEF FOR BRINCO MINING LIMITED AS AMICUS CURIAE	1
INTEREST OF AMICUS CURIAE	1
ARGUMENT	1
I. INTRODUCTION AND SUMMARY	1
II. THE NEW JERSEY TOLLING STATUTE COMPELS A FOREIGN CORPORATION TO SUBMIT TO A BURDENSOME LICENSING SCHEME AS A CONDITION OF ASSERTING NEW JERSEY STATUTES OF LIMITATION	4
III. THE NEW JERSEY TOLLING STATUTE UNCONSTITUTIONALLY BURDENS INTERSTATE COMMERCE BY CONDITIONING ASSERTION OF STATE STATUTES OF LIMITATION ON SUBMITTING TO NEW JERSEY'S LICENSING SCHEME	9
CONCLUSION	15

TABLE OF AUTHORITIES

CASES: Page

Allenberg Cotton Co. v. *Pittman*, 419 U.S. 20 (1974) 10, 11
Buck Stove & Range Co. v. *Vickers*, 226 U.S. 205 (1912) 10
Colonial Pipeline Co. v. *Traigle*, 421 U.S. 100 (1975) 10
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 10
Crutcher v. *Kentucky*, 141 U.S. 47 (1891) 4, 9
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U.S. 282 (1921) 9, 10
DaMato v. *Turner & Newall, Ltd.* Nos. 80-2762/3/4/5 (3d Cir., June 22, 1981) vii
Davis v. *Farmers Co-operative Equity Co.*, 262 U.S. 312 (1923) 12
Day v. *Stokes*, 97 N.J. Eq. 378, 127 A. 331 (1925) .. 13
Denver & R.G.W. R.R. v. *Terte*, 284 U.S. 284 (1932) 12
Dew v. *Appleberry*, 23 Cal.3d 630, 591 P.2d 509 (1979) (en banc) ..... vii, 8
Duke University v. *Chestnut*, 28 N.C. App. 568, 221 S.E.2d 895 (1976) ..... vii, 8
Eli Lilly & Co. v. *Sav-On Drugs, Inc.*, 366 U.S. 276 (1961) 3, 9, 11, 12
Garrity v. *New Jersey*, 385 U.S. 493 (1967) 4, 10, 12
Grow Farms Corp. v. *National State Bank*, 167 N.J. Super 102, 400 A.2d 535 (1979) 13
Hughes v. *Oklahoma*, 441 U.S. 332 (1979) 15
International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 5, 12
International Textbook Co. v. *Pigg*, 217 U.S. 91 (1910) 9, 10
Lewis v. *BT Investment Managers, Inc.*, 397 U.S. 137 (1970) 14, 15
Litton Industrial Systems, Inc. v. *Kennedy Van Saun Corp.*, 117 N.J. Super 52, 283 A.2d 551 (1971) 7

TABLE OF AUTHORITIES—Continued

	Page
Materials Research Corp. v. *Metron*, 64 N.J. 74, 312 A.2d 147 (1973)	7
Michigan Central R.R. v. *Mix*, 278 U.S. 492 (1929)	12
Neirbo Co. v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939)	7
Order of R.R. Telegraphers v. *Railway Express Agency, Inc.*, 321 U.S. 342 (1944)	6
Pennoyer v. *Neff*, 95 U.S. 714 (1877)	5
Pennsylvania Fire Ins. Co. v. *Gold Issue Mining and Milling Co.*, 243 U.S. 93 (1917)	7
Perkins v. *Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952)	7
Philadelphia v. *New Jersey*, 437 U.S. 617 (1978)	14
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970)	14, 15
Protective Finance Corp. v. *Glass*, 100 N.J.L. 85, 2 N.J. Misc. 818, 125 A. 879 (1924)	13
Randolph Laboratories, Inc. v. *Specialties Development Corp.*, 62 F. Supp. 897 (D.N.J. 1945)	7
Scanapico v. *Richmond, F.&P. R.R.*, 439 F.2d 17 (2d Cir. 1970) (en banc)	12
Sioux Remedy Co. v. *Cope*, 235 U.S. 197 (1914)	9
United States v. *Kubrick*, 444 U.S. 111 (1979)	6, 13
Velmohos v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980), *appeal pending*, No. 80-629 (U.S. Sup. Ct.)	2, 5, 6
Western & S.L.I. Co. v. *State Board of Equalization*, 49 U.S.L.W. 4542 (U.S. Sup. Ct., May 26, 1981)	9
World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980)	14
CONSTITUTION AND STATUTES:	
U.S. CONST. art. I, § 8, Cl. 3	9
Cal. Corp. Code § 2105 (West 1980 Supp.)	8
Cal. Corp. Code § 2108 (West 1977)	8
1949 N.J. Laws 495	5
1820 N.J. Laws 670	5
N.J. Stat. Ann. § 2A:14-22 (West 1952)	1, 2, 13

TABLE OF AUTHORITIES—Continued

	Page
N.J. Stat. Ann. § 14A:4-1 (West 1981 Supp.)	6
N.J. Stat. Ann. § 14A:4-5 (West 1981) Supp.)	6, 8
N.J. Stat. Ann. §§ 14A:13-1 *et seq.* (West 1969 & 1981 (Supp.)	2
N.J. Stat. Ann. § 14A:13-3 (West 1969 & 1981 Supp.)	2
N.J. Stat. Ann. § 14A:13-4 (West 1969)	6, 7, 8
N.J. Stat. Ann. § 54:10A-2 (West 1981 Supp.)	6, 8
S.C. Code § 12-19-20 (1980 Supp.)	8
S.C. Code § 12-19-70 (1976 & 1980 Supp.)	8
S.C. Code § 12-19-130 (1976 & 1980 Supp.)	8
S.C. Code § 33-23-20 (1977 & 1980 Supp.)	8
Tex. Bus. Corp. Act. Ann. art. 8.05 (Vernon 1980)	8
Tex. Tax-Gen. Ann. arts. 12.01, 12.06 (Vernon 1980 Supp.)	8
Tex. Tax-Gen. Ann. arts. 12.01, 12.08 (Vernon 1969 & 1980 Supp.)	8
RULES AND REGULATIONS:	
N.J. Adm. Code § 18:7-1.6 (1979 Supp.)	6, 8
N.J.R. 4:4-4(c) (prior to 1958 N.J. Ct. R.R. 4:4-4(d))	5
United States Supreme Court Rules,	
Rule 36(3)	v
Rule 42	v
OTHER AUTHORITIES:	
Annot., *Absence As Tolling Statute of Limitations*, 55 A.L.R.3d 1158 (1974)	8
Kurland, *The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569 (1958)	5
Model Bus. Corp. Act Ann. 2d	
§§ 110-128 (1971 and 1973 & 1977 Supp.)	8
§ 133 (1971)	8
L. Tribe, *American Constitutional Law*, §§ 6-13 (1978)	9, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-644

G.D. SEARLE & CO.,

Petitioner,

v.

SUSAN COHN AND WALTER COHN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION OF BRINCO MINING LIMITED FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Brinco Mining Limited ("Brinco") hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as amicus curiae, suggesting that the decision below should be reversed.[1]

Brinco is a Canadian corporation with its head office in Vancouver, British Columbia. Since 1953, Brinco has

---

[1] Pursuant to Rule 36(3) of the Rules of this Court, Brinco has requested, but has not received, the parties' consent to the filing of the attached brief as amicus curiae.

mined asbestos fiber in northern British Columbia. It has sold that fiber to industrial concerns around the world, including a number of companies in the United States. The purchasers of Brinco's fiber have used that fiber to manufacture a wide variety of asbestos-containing products.

Beginning in 1974, Brinco, along with others, has been named in a large number of products liability suits brought by employees of companies that have purchased asbestos fiber from Brinco. These actions generally allege that the plaintiffs have contracted diseases such as as asbestosis from prolonged exposure to asbestos fiber over a period of many years of employment at asbestos products manufacturing plants. The plaintiffs typically contend that the defendants are liable for failing to warn them of the possible health consequences of exposure to asbestos fiber.[2] To date, approximately 1550 plaintiffs have filed such actions against Brinco in 13 different states. Actions by approximately 325 such plaintiffs are pending against Brinco in New Jersey, whose tolling provision is the focus of the present case.

Brinco sells its asbestos fiber solely in Canada, F.O.B. Vancouver. It has never transacted business within any of the United States and has never designated an agent for service of process upon it in any of the United States. Accordingly, the plaintiffs in the actions brought against Brinco have asserted personal jurisdiction over Brinco on the basis of the so-called "long arm" jurisdictional statutes of the various forum states. Their assertion of jurisdiction on the basis of such statutes has generally been sustained.

---

[2] In many of these cases, the plaintiffs assert that their exposure to the defendants' asbestos fiber commenced in the early years of plaintiffs' employment, *i.e.*, in the 1940's and 1950's. These cases therefore in large part turn on conduct of the parties that occurred many years ago.

A significant number of the actions brought against Brinco involve claims the company believes are stale and barred by the statutes of limitation. While the precise events that trigger the running of the statutes of limitation vary from jurisdiction to jurisdiction, Brinco has successfully asserted summary judgment actions on these grounds even in states that follow a liberal "discovery rule" construction of their statutes of limitation.[3]

The ruling of the court below, if sustained by this Court, will greatly affect Brinco's position in the actions pending against it. Brinco is not present in any of the states in which these actions are pending. It therefore will be unable to assert the statute of limitations as a defense in any forum that construes its statute of limitations tolling provision, as does New Jersey, to toll perpetually the statute against a defendant who is not present in the state. In all these states, stale claims that would otherwise likely be barred could be asserted against Brinco if the decision of the court below is not reversed.[4]

---

[3] In *DaMato* v. *Turner & Newall, Ltd.*, Nos. 80-2762/3/4/5 (3d Cir., June 22, 1981), for example, the court of appeals affirmed summary judgments in favor of Brinco and others which dismissed as barred by the statute of limitations the claims of four of the first 14 plaintiffs who brought actions claiming damages as a result of their employment at one particular asbestos products manufacturing plant in Pennsylvania.

[4] In addition to the 325 suits pending against Brinco in New Jersey, suits are now pending in several other states that appear to construe their statutes of limitation tolling provisions in a fashion similar to New Jersey. The district court below identified two such states other than New Jersey—South Carolina and Texas—that have construed their tolling provisions in a manner that makes their statutes of limitation unavailable to unlicensed foreign corporations. *Cohn* v. *G.D. Searle & Co.*, 447 F.Supp. 903, 912-13, n.21 (D. N.J. 1978). Other states may be adopting similar constructions. See, *e.g.*, *Dew* v. *Appleberry*, 23 Cal. 3d 630, 591 P.2d 509 (1980); *Duke University* v. *Chestnut*, 28 N.C. App. 568, 221 S.E.2d 895 (1976).

Additionally, absent a reversal in this case, Brinco would have to alter its relationships with many of the states in which its products are distributed. In this regard, Brinco would have to take all steps necessary to be certain that it is sufficiently present or represented within those states to assure that it would not in the future be denied the protections of the statutes of limitation.

In sum, the issues raised by this case are of critical importance to Brinco and to other similarly situated parties. For this reason, and because Brinco believes its analysis of those issues may assist this Court in resolving them, it seeks leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

STEPHEN J. POLLAK*
I. MICHAEL GREENBERGER
FRANKLIN D. KRAMER
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Attorneys for Amicus Curiae Brinco Mining Limited

Of Counsel:
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Dated: July 6, 1981

* Counsel of Record

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-644

G.D. SEARLE & CO.,

Petitioner,

v.

SUSAN COHN AND WALTER COHN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR BRINCO MINING LIMITED AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set forth in the accompanying motion for leave to file this brief as amicus curiae.

ARGUMENT

I. INTRODUCTION AND SUMMARY

This case concerns the constitutionality of a New Jersey statute, N.J. Stat. Ann. § 2A:14-22 (West 1952), which tolls indefinitely certain New Jersey statutes of limitation for purposes of any suit against, *inter alia*, a corporation that is neither organized under the laws of,

nor "represented" within, New Jersey (hereinafter a "foreign corporation").[1] The statute does not define the term "represented," but in *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980), *appeal pending*, No. 80-629 (U.S. Sup. Ct.), the New Jersey Supreme Court ruled, as a practical matter, that a foreign corporation must obtain a "certificate of authority" to "transact business in" New Jersey to be "represented" in that state for purposes of the tolling provision.[2]

In this action, the defendant moved for dismissal of plaintiffs' complaint on grounds that it was filed two

---

[1] Section 2A:14-22 provides:

"If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said section, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation."

[2] N.J. Stat. Ann. §§ 14A:13-1 *et seq.* (West 1969 & 1980 Supp.) set forth the rights and obligations of foreign corporations under New Jersey law. Section 14A:13-3 provides that "[n]o foreign corporation shall have the right to transact business in this State until it shall have procured a certificate of authority so to do from the Secretary of State."

years after the applicable statute of limitations had expired. C.App. 4a-5a.[3] Plaintiffs opposed the motion by relying on the tolling statute, contending that, although the defendant foreign corporation was subject to New Jersey's long-arm rule, it was nonetheless not "represented" within New Jersey. *Id.* The district court agreed that the defendant was not "represented" within New Jersey, but held that the tolling statute "denies equal protection to foreign corporations amenable to long-arm jurisdiction" and is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. C.App. 47a. The district court also recognized that a foreign corporation would have to obtain a New Jersey certificate of authority to be "represented" within the state for purposes of the tolling statute. It concluded therefore that "since state licensure [of this sort] may not be required of a foreign corporation which is involved in the state solely in interstate commerce, *Eli Lilly & Co.* v. *Sav-On Drugs, Inc.*, 366 U.S. 276, 278, & n.7 (1961)," the New Jersey tolling provision "would [also] run afoul of the [C]ommerce [C]lause" if not overturned. C.App. 45a, n.17. The court of appeals reversed the district court's equal protection holding and held for plaintiffs without addressing defendant's[4] or the district court's Commerce Clause analysis. C.App. 18a-25a.

Amicus endorses the arguments that have been advanced by defendant that New Jersey's tolling statute violates the Equal Protection and Due Process Clauses. Because it is a foreign corporation engaged in New Jersey exclusively in interstate commerce, Brinco is most concerned with and herein addresses only the second

---

[3] "C.App." refers to the appendix to the petition for a writ of certiorari filed by defendant G.D. Searle & Co. in this matter.

[4] See defendant's brief to the court of appeals, pp. 33-38.

question presented in this case, whether the statute unduly burdens interstate commerce in contravention of the Commerce Clause. 49 U.S.L.W. 3779 (U.S. Sup. Ct., April 20, 1981).

In Section II, we show how the New Jersey tolling statute effectively compels a foreign corporation engaged exclusively in interstate commerce, and otherwise fully amenable to long-arm service of process, to submit to a burdensome licensing scheme in order to assert important New Jersey statutes of limitation. Next, in Section III, we show that this Court has long held "that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how [meritorious] the pretext may be for imposing it," *Crutcher* v. *Kentucky*, 141 U.S. 47, 58 (1891), and that the right to engage in interstate commerce free of licensure is a "right[] of Constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967). Because the New Jersey tolling statute bars use of the State's limitations defense as the "price" of exercising the constitutional right to be free of state licensing, that provision violates the Commerce Clause of the United States Constitution.

II. THE NEW JERSEY TOLLING STATUTE COMPELS A FOREIGN CORPORATION TO SUBMIT TO A BURDENSOME LICENSING SCHEME AS A CONDITION OF ASSERTING NEW JERSEY STATUTES OF LIMITATION.

The New Jersey Legislature's purpose in enacting the tolling provision at issue was to prevent certain statutes of limitation from applying in actions in which foreign corporations were unable to be served because of then-existing restrictions on the extraterritorial reach of New

Jersey's service of process rules. See, *e.g.*, *Velmohos* v. *Maren Engineering Corp.*, *supra*, 416 A.2d at 376-77.[5] Despite this purpose, the New Jersey Supreme Court in *Velmohos* held that a corporation is not represented for purposes of the tolling statute even where, as in the instant case, the foreign corporation is, under the New Jersey long-arm rule (see n. 5, *supra*), just as amenable to service of process by a New Jersey plaintiff as is a corporation incorporated or represented within New Jersey.

Under this construction of the tolling statute by the State's highest court, a corporation organized under the

---

[5] When the New Jersey tolling provision was originally enacted in 1820 (1820 N.J. Laws 670), the *in personam* jurisdictional power of a state did not extend beyond its borders. See, *e.g.*, *Pennoyer* v. *Neff*, 95 U.S. 714 (1877). At that juncture, the New Jersey provision self-evidently served an important function by tolling statutes of limitation against, *inter alia*, out-of-state corporations which could not be reached by New Jersey plaintiffs. In *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945), this Court expanded a state's *in personam* jurisdiction to cover persons beyond the territorial limits of a state who "ha[d] certain minimum contacts with it." As a result of this decision numerous states enacted "long-arm" statutes greatly expanding extraterritorial service of process. Kurland, *The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569 (1958).

New Jersey did not adopt its long-arm rule until 1958. N.J. Ct. R. R. 4:4-4(d) (presently N.J. R. 4:4-4(c)). In 1949, when New Jersey amended the tolling provision to its present form, it only tolled the statutes of limitation in actions against out-of-state corporations *not* represented in New Jersey. 1949 N.J. Laws 495. In *Velmohos*, the New Jersey Supreme Court reasoned that, since there was no New Jersey long-arm provision in 1949, the New Jersey Legislature could not have intended that an unlicensed foreign corporation would be represented within New Jersey even though such a corporation is now amenable to service under the long-arm rule promulgated in 1958. As the district court below concluded, "[w]hile the tolling statute made eminent good sense in the days of territorial restrictions on service, it has become dated in the instant context by modern changes in the law of in personam jurisdiction." C.App. 48a.

laws of, or represented within, New Jersey, enjoys completely the repose and certainty afforded by New Jersey statutes of limitation. Foreign corporations, on the other hand, even when fully amenable to service of process under the New Jersey long-arm rule, lose "the right to be free of stale claims," *Order of R.R. Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349 (1944), and "hav[e] to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979).[6]

The New Jersey Supreme Court in *Velmohos* recognized the inequities worked by the tolling statute, but concluded "that whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State." 416 A.2 at 378, n.10. The court, however, referred to no New Jersey statute or rule which permits a foreign corporation to designate an agent for service of process within New Jersey without incurring additional in-state obligations.

In fact, no statutory provision allows for such designation on behalf of a foreign corporation except in connection with an application for a "certificate of authority" to "transact business in" New Jersey, pursuant to N.J. Stat. Ann. § 14A:13-4 (West 1969). Obtaining such a certificate of authority, however, automatically requires, *inter alia*, maintenance of a registered business office, N.J. Stat. Ann. § 14A:4-1 (West 1981 Supp.); the filing of annual reports with the New Jersey Secretary of State, *id.* § 14A:4-5 (West 1981 Supp.); and the payment of a New Jersey francise tax, *id.* § 54:10A-2 (West 1981 Supp.) & N.J. Ad. Code § 18:7-1.6 (1979 Supp). More-

[6] Thus, as the district court correctly observed, the New Jersey tolling statute "allow[s] a [New Jersey] plaintiff to postpone indefinitely the assertion of his cause of action even though the defendant [foreign corporation is] subject to service." C.App. 48a.

over, the presence of the registered agent and all of the other accoutrements of this licensing scheme constitute a consent to process that not only subjects the foreign corporation to service by New Jersey plaintiffs, but could make New Jersey a forum in which the foreign corporation might readily be sued by non-New Jersey plaintiffs—perhaps even on causes of action not arising out of the corporation's New Jersey contacts. *See generally Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 444-45 (1952); *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939); *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917); *Randolph Laboratories, Inc.* v. *Specialties Development Corp.*, 62 F. Supp. 897 (D.N.J. 1945); *Litton Industrial Systems, Inc.* v. *Kennedy Van Saun Corp.*, 117 N.J. Super 52, 60-62, 283 A.2d 551, 555-56 (1971).

The burdensome nature of this licensing process is underscored by the fact that the "certificate of authority" to "transact business *in*" New Jersey, N.J. Stat. Ann. § 14A:13-4 (West 1969) (emphasis added), was never intended to apply to foreign corporations, such as amicus, whose *only* presence in the State is that its products enter there through the normal channels of interstate commerce. Nor was it intended to apply to the defendant here, which, as the record below clearly shows, merely solicits sales within New Jersey. C.App. 35a. The New Jersey Supreme Court has held expressly that to "transact business in" New Jersey, so as to require possession of a certificate of authority, a foreign corporation must be found to do something more than merely solicit sales there. See, *e.g.*, *Materials Res. Corp.* v. *Metron, Inc.*, 64 N.J. 74, 82-83, 312 A.2d 147, 151-52 (1973). Thus, in order to assert the relevant New Jersey statutes of limitation, a foreign corporation engaged exclusively in *interstate* commerce within New Jersey must obtain a license entailing obligations designed solely for foreign corporations engaging in *intrastate* New Jersey business.

Finally, the burdens on interstate commerce presented by the New Jersey tolling scheme are magnified when they are perceived in a national context. The district court below noted that two states (South Carolina and Texas) in addition to New Jersey have construed their tolling provisions in a fashion which makes statutes of limitation unavailable to unlicensed foreign corporations. C.App. 49a, n.21 (and cases cited therein). See also, *e.g.*, Annot., *Absence As Tolling Statute of Limitations*, 55 A.L.R.3d 1158 (1974). The number of states may even be higher. See, *e.g.*, *Dew* v. *Appleberry*, 23 Cal.2d 630, 591 P.2d 509 (1979); *Duke University* v. *Chestnut*, 28 N.C. App. 568, 221 S.E.2d 895 (1976). Without constitutional protection, corporations engaged in interstate commerce will be forced to incur all of the obligations imposed by licensing schemes in each such state jurisdiction which tolls, or even potentially tolls, statutes of limitation against unlicensed foreign corporations.[7]

---

[7] Following the Model Bus. Corp. Act Ann. 2d §§ 110-128 (1971 and 1973 & 1977 Supp.), many States—including California, South Carolina, and Texas, see p. 8, *supra*—have licensing provisions pertaining to foreign corporations similar to those of New Jersey. *Compare, e.g.*, N.J. Stat. Ann. § 14A:13-4 (West 1969) (statutory provision for designation of registered agent by foreign corporation is a part of statutory provision for certificate of authority to transact business), *with* Model Bus. Corp. Act Ann. 2d § 110 (1971); Cal. Corp. Code § 2105 (West 1980 Supp.); S.C. Code § 33-23-20 (1977 & 1980 Supp.); Tex. Bus. Corp. Act Ann. art. 8.05 (Vernon 1980); *and compare* N.J. Stat. Ann. § 14A:4-5 (West 1981 Supp.) (automatically requiring holders of certificates of authority to file annual reports), *with* Model Bus. Corp. Act Ann. 2d §§ 125, 126 (1971); Cal. Corp. Code § 2108 (West 1977); S.C. Code § 12-19-20 (1980 Supp.); Tex. Tax-Gen. Ann. arts. 12.01, 12.08 (Vernon 1969 & 1980 Supp.). *Compare also* N.J. Stat. Ann. § 54:10A-2 (West 1980 Supp.); N.J. Ad. Code § 18:7-1.6 (1979 Supp.) (making holders of certificates of authority automatically subject to franchise tax), *with* Model Bus. Corp. Act Ann. 2d § 133 (1971); S.C. Code §§ 12-19-70, 12-19-130 (1976 & 1980 Supp.); Tex. Tax-Gen. Ann. arts. 12.01, 12.06 (Vernon 1980 Supp.).

III. THE NEW JERSEY TOLLING STATUTE UNCONSTITUTIONALLY BURDENS INTERSTATE COMMERCE BY CONDITIONING ASSERTION OF STATE STATUTES OF LIMITATION ON SUBMITTING TO NEW JERSEY'S LICENSING SCHEME.

The Commerce Clause provides that "The Congress shall have Power . . . To regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. While "[i]n terms, the Clause is a grant of authority to Congress, . . . a long line of cases stretching back to the early days of the Republic . . . has recognized that the [provision] contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce." *Western & S.L.I. Co.* v. *Board of Equalization*, 49 U.S.L.W. 4542, 4543 (U.S. Sup. Ct., May 26, 1981) (footnote omitted).

It is, accordingly, an age-old and fundamental axiom of Commerce Clause jurisprudence "that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce no matter how [meritorious] the pretext may be for imposing it." *Crutcher* v. *Kentucky*, 141 U.S. 47, 58 (1891). See also, *e.g.*, *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 291 (1921); *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197 (1914); *International Textbook Co.* v. *Pigg*, 217 U.S. 91 (1910); L. Tribe, *American Constitutional Law* § 6-13 at p. 342 (1978). Indeed, it has been held that, "[u]nder the authority of the so-called 'drummer' cases, such as *Robbins* v. *Shelby County Taxing District*, [120 U.S. 489 (1887), a foreign corporation] is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State." *Eli Lilly & Co.* v. *Sav-On Drugs, Inc.*, 366 U.S. 276, 278-79 (1961).

Thus, a foreign corporation engaging exclusively in interstate commerce within a state has a right to be free

of any of that state's licensing requirements. This Court, in turn, has concluded that this kind of right is "of a Constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967). Giving effect to that right, the Court has frequently invalidated state statutes which required foreign corporations engaged exclusively in interstate commerce to forego their right to sue in state courts as a condition of avoiding state licensing requirements. See, *e.g.*, *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974) (invalidating statute making the receipt of a certificate of authority a condition to the right to sue in state court);[8] *Dahnke-Walker Mining Co.* v. *Bondurant*, *supra* (invalidating statute making the receipt of a license and agreement that process can be served upon the secretary of state a condition to the right to sue); *Buck Stove & Range Co.* v. *Vickers*, 226 U.S. 205 (1912) (invalidating statute making the receipt of a license, agreement to designate the secretary of state for service of process, payment of a school tax and the filing of a corporation charter a condition to the right to sue). In this regard, state statutes have been struck down even when court access has been conditioned on only minimal infringements upon interstate commerce. See, *e.g.*, *International Textbook Co.* v. *Pigg*, *supra* (invalidat-

[8] In *Allenberg Cotton Co.*, it was stressed that the question whether a state can condition access to its courts on obtaining a certificate of authority was wholly separate from the question whether the state could tax the intrastate aspects of interstate commerce. 419 U.S. at 33-34 ("Whether there were local tax incidents of those contacts which could be reached is a different question on which we express no opinion. * * * We hold only that Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause.") This distinction is important, because it makes clear that this Court's holdings expanding the states' power to tax the local incidents of interstate commerce are irrelevant to the present controversy. See, *e.g.*, *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977); *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 111, n.8 (1975).

ing statute making the receipt of a $25.00 license and agreement that service could be effected on secretary of state a condition to the right to sue).

The Court's ruling in *Eli Lilly & Co.* v. *Sav-On Drugs*, *supra*, is of particular relevance. There, the Court, relying upon the cases cited above (except *Allenberg Cotton Co.*, which had not then been decided), declared that "[i]t is well established that New Jersey cannot require [a corporation] to get a certificate of authority to do business [as a condition of engaging in a law suit] if its participation in this trade is limited to its wholly interstate sales." *Id.* at 278-79. This is exactly the condition New Jersey is imposing upon foreign corporations in order for them to be able to assert New Jersey statutes of limitation.

Because of the State's tolling statute, foreign corporations engaged exclusively in interstate commerce within New Jersey and otherwise amenable to service under the State's long-arm rule are required, as a condition of being able to assert the defense of a New Jersey statute of limitation, to forsake their constitutional right to be free of state licensing. To preserve the statutes' protections, they must obtain from New Jersey a certificate of authority. The certificate, in turn, automatically imposes on them obligations of, *inter alia*, continuously maintaining a registered New Jersey office, filing annual New Jersey reports, paying New Jersey franchise taxes, and making themselves amenable to suit within New Jersey by New Jersey and non-New Jersey plaintiffs alike, perhaps even in causes of action that have no relationship to New Jersey. See pp. 6-7, *supra*.[9] Indeed, foreign cor-

[9] This possible consequence of New Jersey's requirement of a registered agent for service of process—that a non-resident defendant engaged solely in interstate commerce might be sued by a non-resident plaintiff on a cause of action not arising in the forum state—may alone be an impermissible burden on interstate com-

[Footnote continued on page 12]

porations engaged exclusively in *interstate* activity must obtain the New Jersey certificate of authority even though, under the plain terms of the relevant New Jersey statutes and cases (see p. 7, *supra*), such a certificate is only required of foreign corporations engaged in *intrastate* New Jersey commerce.

Plaintiffs, in their brief in opposition to the petition for certiorari (at 17), do not deny the burdensome effect of New Jersey's licensing requirements.[10] They instead seek to dismiss *Eli Lilly & Co.* and other like cases on the ground that they only bar the requirement of a license when it is made a condition to a foreign corporation's "right to sue others." Plaintiffs observe (*id.*) "that [defendant] has never contended that it did not have a right to sue in the Courts of New Jersey."

Plaintiffs' attempt to distinguish between the right to sue and the right to assert what may be a dispositive limitations defense is unavailing. This Court has made it clear that "rights of a Constitutional stature," such as "[e]ngaging in interstate commerce," "may not [be] condition[ed] by the exaction of a price." *Garrity* v. *New Jersey*, *supra*, 385 U.S. at 500. See also, *e.g.*, L.

---

[9] [Continued]

merce in some circumstances. See, *e.g.*, *Denver & R.G.W. R.R.* v. *Terte*, 284 U.S. 284 (1932); *Michigan Central R.R.* v. *Mix*, 278 U.S. 492 (1929); *Davis* v. *Farmers Co-operative Equity Co.*, 262 U.S. 312 (1923). This restriction on the permissible reach of *in personam* jurisdiction under the Commerce Clause is wholly independent of, and where applicable may be more rigorous than, the limitations imposed by the Due Process Clause. See, *e.g.*, *Davis* v. *Farmers Co-operative Equity Co.*, *supra* at 317-18. Thus the restriction is unaffected by *International Shoe's* expansion of *in personam* jurisdiction under the Due Process Clause. See, *e.g.*, *Scanapico* v. *Richmond, F.&P. R.R.*, 439 F.2d 17, 25-26 (2d Cir. 1970) (en banc) (Friendly, J.).

[10] Indeed, in the district court, plaintiffs recognized the burdensome effect of the tolling statute by contending that it was intended to be "a *penalty* to induce licensure" of foreign corporations in New Jersey. C. App. 44a (emphasis added).

Tribe, *supra*, § 6-13 at pp. 342-343 & n.5. Thus, it is not defendant's burden to demonstrate that the price of foregoing the right to assert a limitations defense is as high as the price of foregoing the right to sue—although amicus believes it clearly is as high.[11] The only question is whether foregoing the protection of the statute of limitations is "the exaction of a price" at all. This Court, in *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979), made quite clear that it is, when it said:

> "Statutes of limitations, which 'are found and approved in all systems of enlightened jurisprudence,' *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' * * * We should regard the plea of limitations as a 'meritorious defense, in itself serving a public interest.' *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938)."

Moreover, the "price" would not be exacted only in New Jersey. Foreign corporations engaged in interstate commerce would lose the protections of applicable stat-

---

[11] Indeed, a foreign corporation can immediately overcome the bar to its right to sue upon existing claims by submitting itself to the state's licensing system. See, *e.g.*, *Grow Farms Corp.* v. *National State Bank*, 167 N.J. Super. 102, 400 A.2d 535 (1979) (foreign corporation allowed to obtain certificate during pendency of action, if necessary, in order to avoid motion to dismiss); *Day* v. *Stokes*, 97 N.J. Eq. 378, 127 A. 331 (1925) (certificated foreign corporation may sue on contract executed before certification); *Protective Finance Corp.* v. *Glass*, 100 N.J.L. 85, 2 N.J. Misc. 818, 125 A. 879 (1924) (same). But licensing will *not* automatically entitle a foreign corporation to assert a limitations defense as to pending claims. Instead, as the terms of the tolling statute (N.J. Stat. Ann. 2A:14-22 (West 1952)) make plain, licensing will only commence the *running* of the limitations statute—clearly a "price" which exceeds that found in "the right to sue" context.

utes of limitation in other jurisdictions that have similar tolling provisions unless they submit themselves to the licensing systems of those states. See p. 8, *supra*. In this regard, it must be remembered that service of process under traditional long-arm rules may be obtained in some circumstances upon a foreign corporation even when its product does not enter a state through direct sales, but, instead, finds its way there indirectly long after the product has left the foreign corporation's control. See, *e.g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). Thus, if there is any foreseeable likelihood that a foreign corporation's products will wend their way into a state with a tolling provision similar to New Jersey's, prudence will dictate that all of the obligations inherent in the state licensing systems be incurred in order that relevant statutes of limitation may be asserted.

In sum, the precedents of this Court establish that New Jersey cannot constitutionally condition the availability of its statutes of limitation to foreign corporations engaged exclusively in interstate commerce within that state on their submitting to New Jersey licensing processes. Therefore, the New Jersey tolling statute as applied to these foreign corporations must be invalidated on the ground that it violates the Commerce Clause of the United States Constitution.[12]

---

[12] Distinguished from the case at bar are those cases where a state has jurisdiction to regulate foreign corporations because of their involvement in intrastate commerce, see, *e.g.*, *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) (foreign corporation grows produce intrastate); or because of their desire to be involved in intrastate commerce, see, *e.g.*, *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980) (foreign corporation seeking to establish investment advisory service intrastate). In such cases, however, the Court has still invalidated state statutes on Commerce Clause grounds. It has done so either because the statute amounts to "simple economic protectionism" in which case a "virtual[] *per se* rule of invalidity" is applied, *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978); or because, even though "protectionism" is not

CONCLUSION

For the reasons stated above and in the Brief for the Petitioner, we urge the Court to reverse the decision below.

Respectfully submitted,

STEPHEN J. POLLAK*
I. MICHAEL GREENBERGER
FRANKLIN D. KRAMER
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Attorneys for Amicus Curiae Brinco Mining Limited

Of Counsel:
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Dated: July 6, 1981

* Counsel of Record

---

found, "the nature of the local interest" to be protected by the statute "could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, *supra*, 397 U.S. at 142. See also, *e.g.*, *Lewis* v. *BT Investment Managers, Inc.*, *supra*, 447 U.S. at 37; *Hughes* v. *Oklahoma*, 441 U.S. 332, 327 (1979).

Even using the latter and more lenient of these two tests, it is self-evident that the purposes underlying the tolling statute can be accomplished "with a lesser impact on interstate activities" than by abolishing the limitations defense for unregistered corporations whether or not they can be served in New Jersey. Thus, as we have shown, the burdens imposed by the tolling statute on interstate commerce are substantial and the statute's original purpose was addressed to a problem—preserving claims of New Jersey plaintiffs who did not have *in personam* jurisdiction over foreign corporations—has been resolved in New Jersey, as it has in most states, by adoption of a long-arm rule. Whatever problems remain in serving unregistered foreign corporations in New Jersey actions—and the district court quite persuasively demonstrated that there are virtually none (C. App. 47a, n.19)—can readily be addressed by amendments to New Jersey statutes or rules which would ensure that a complaint will not be dismissed in cases where a New Jersey plaintiff is having legitimate difficulties serving a foreign corporation. In sum, even under a balancing test applied to states statutes affecting foreign corporations with intrastate contacts, the tolling statute should still be found to violate the Commerce Clause.

SEP 21 1981

No. 80-644

In The

Supreme Court of the United States

OCTOBER TERM, 1980

G. D. SEARLE & CO.,
Petitioner,

-vs-

SUSAN COHN AND WALTER COHN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
and
FOR LEAVE TO ARGUE ORALLY ON THE SIDE OF RESPONDENTS, WITH THEIR CONSENT,
and
BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICUS CURIAE

On the Brief
ARTHUR IAN MILTZ, ESQ.

Of Counsel
Richard F. Gerry, Esq.
President, The Association
of Trial Lawyers of America
110 Laurel Street
San Diego, California 92101
(714) 238-1811

KRONISCH & SCHKEEPER
A Professional Corporation
Attorneys for Amicus Curiae,
the Association of Trial Lawyers
of America
139 E. McClellan Avenue
Livingston, New Jersey 07039
(201) 994-1016

The Superior Appellate Printing Co. - Cranbury, N.J. 08512

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Motion of Association of Trial Lawyers of America for Leave to file Brief as Amicus Curiae and for Leave to Argue Orally on the side of Respondents, with their Consent	vii
Brief of Association of Trial Lawyers of America as Amicus Curiae	1
Interest of Amicus Curiae	1
Summary of Argument	1
Argument	
POINT I THE CONSTRUCTION GIVEN TO N.J.S.A. 2A:14-22 BY THE NEW JERSEY SUPREME COURT IN VELMOHOS IS BINDING UPON THIS COURT	6
A. THE CONSTRUCTION OF A STATE STATUTE BY THE STATE'S HIGHEST COURT IS BINDING UPON THE UNITED STATES SUPREME COURT	6
B. STATUTES OF LIMITATION ARE LIBERALLY CONSTRUED IN NEW JERSEY IN ORDER TO PRESERVE PARTIES OPPORTUNITIES TO LITIGATE CLAIMS ON THE MERITS	8
POINT II THE NEW JERSEY TOLLING STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION, DUE PROCESS OR COMMERCE CLAUSES	12

CONTENTS

		PAGE
A.	THE NEW JERSEY TOLLING STATUTE IS ENTITLED TO A STRONG PRESUMPTION OF VALIDITY	12
B.	THE NEW JERSEY TOLLING STATUTE DOES NOT DENY EQUAL PROTECTION OR DUE PROCESS OF LAW TO UNREPRESENTED FOREIGN CORPORATIONS	13
C.	THE NEW JERSEY TOLLING STATUTE DOES NOT VIOLATE THE COMMERCE CLAUSE	20
Conclusion		25

TABLE OF AUTHORITIES

PAGE

Cases Cited:

Bellotti v. Baird, 443 U.S. 662, 61 L.Ed. 2d 797, 99 S.Ct. 3035 (1979), reh den 62 L.Ed. 2d 121, 100 S.Ct. 185 (1979) ... 7

Bozzuto's, Inc. v. Frank Kantrowitz & Sons, Inc., 117 N.J. Super. 146, 283 A.2d 907, 908 (App. Div. 1971) 10

Breard v. City of Alexandria, La., 341 U.S. 622, 95 L.Ed. 1233, 71 S.Ct. 920 (1951), reh den 342 U.S. 843, 96 L.Ed. 637, 72 S.Ct. 21 (1951) 21

Brown v. Ohio, 432 U.S. 161, 167, 53 L.Ed. 2d 187, 195, 97 S.Ct. 2221 (1977) 2,6

Campbell v. Holt, 115 U.S. 620, 29 L.Ed. 483, 6 S.Ct. 209 (1885) 8,13

Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314, 89 L.Ed. 1628, 65 S.Ct. 1137 (1945) 8,13

Clark v. Gulesian, 429 F.2d 405 (1st Cir. 1970), (cert. denied, 400 U.S. 993 (1971) 19

Craig v. Boren, 429 U.S. 190, 210 (1976) 15

Davies Warehouse Co. v. Bowles, 321 U.S. 144, 88 L.Ed. 635, 64 S.Ct. 474 (1944) 12

Dew v. Appleberry, 23 Cal. 3d 637, 153 Cal. Rptr. 219, 223 (1979) 18

AUTHORITIES

PAGE

Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674, 49 L.Ed 2d 132, 138, 96 S.Ct. 2358 (1976) 6

Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276, 6 L.Ed. 2d 288, 81 S.Ct. 1316 (1961) 10

Galligan v. Westfield Centre Service, Inc., 82 N.J. 188 (1980) 3,8

Grayned v. City of Rockford, 408 U.S. 104, 110, 33 L.Ed. 2d 222, 228, 92 S.Ct. 2294 (1972) 6

Gulf Chemical & Metal Corp. v. Sylvan Chem. Corp., 122 N.J. Super. 499, 300 A.2d 878 (Law Div. 1973), aff'd 126 N.J. Super 261, 314 A.2d 73 (App. Div. 1973) 10

Hopkins v. Kelsey-Hayes, Inc., 628 F.2d 801, 809 (3d Cir. 1980) 8

Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329, 338 (1978) 8

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837, 56 L.Ed. 2d 1, 9, 98 S.Ct. 1535 (1978) 2,7

Lindsey v. Normet, 405 U.S. 56, 71, 31 L.Ed. 2d 36, 49, 92 S.Ct. 862 (1972) 12

Lockport v. Citizens for Community Action, 430 U.S. 259, 51 L.Ed. 2d 313, 97 S.Ct. 1047 (1977) 12

AUTHORITIES

	PAGE
McGowan v. Maryland, 366 U.S. 420, 6 L.Ed. 2d 393, 81 S.Ct. 1101 (1961) ...	3,12
Metropolitan Casualty Insurance Co. v. Brownell, 294 U.S. 580, 584 (1935)	15,19
Moore v. Illinois C. R. Co., 312 U.S. 630, 634, 85 L.Ed. 1089, 61 S.Ct. 754 (1941)	7
Morey v. Doud, 354 U.S. 457, 1 L.Ed. 2d 1485, 77 S.Ct. 1344 (1957)	3,13
O'Brien v. Skinner, 414 U.S. 524, 531, 38 L.Ed. 2d 702, 94 S.Ct. 740 (1974)	7
Pittman v. United States, 341 F.2d 739, 741 (9th Cir.), cert. denied, 382 U.S. 941 (1965)	20
Poulos v. New Hampshire, 345 U.S. 395, 402, 97 L.Ed. 1105, 73 S.Ct. 760, 30 ALR 2d 987 (1953)	7
Reed v. Reed, 404 U.S. 71, 76 (1971)	15
Rosenberg v. Town of North Bergen, 61 N.J. 190 (1972)	8
F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 416 (1920)	15,16
San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 36 L.Ed. 2d 16, 93 S.Ct. 1278 (1973)	13
Scherling v. Superior Court of Santa Clara County, 22 Cal. 3d 493, 149 Cal. Rptr. 597, 602-03 (1978)	14,15

AUTHORITIES

PAGE

Standard Oil Co. v. Tennessee ex rel. Cates, 217 U.S. 413, 422, 54 L.Ed. 817, 30 S.Ct. 543 (1910) 7

Tioga R. Co. v. Blossburg & C.R. Co., 20 Wall 137, 22 L.Ed. 331 (1873) .. 7

Vaughn v. Deitz, 430 S.W. 2d 487, 490 (Tex. 1968) 18

Velmohos v. Maren Engineering Corp., 83 N.J. 282, 293 (1980) 3,passim

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972) 15,16

White v. Violent Crimes Compensation Board, 76 N.J. 368, 379 (1978) 8

Williamson v. Lee Optical Co., 348 U.S. 483, 487-488 (1955) 16

Winters v. New York, 333 U.S. 507, 514, 92 L.Ed. 840, 68 S.Ct. 665 (1948) 7

Zalatuka v. Metropolitan Life Insurance Co., 90 F.2d 230 (7th Cir. 1937) 18

Miscellaneous:

N.J.S.A. 2A:14-22 ..... 1,passim

N.J.S.A. 14A:13-3..... 21

N.J.S.A. 14A:13-3(2)(a) 5,10

N.J.S.A. 14A:13-4 10

N.J.S.A. 14A:13-11 9

N.J.S.A. 14A:13-11(2) 5,10

N.J.Ct.R. 4:4-4(c)(1) 10,17

No. 80-644

In The

Supreme Court of the United States

OCTOBER TERM, 1980

G. D. SEARLE & CO.,
Petitioner,

-vs-

SUSAN COHN AND WALTER COHN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE and FOR LEAVE TO ARGUE ORALLY ON THE SIDE OF RESPONDENTS, WITH THEIR CONSENT

The Association of Trial Lawyers of America hereby moves, pursuent to Rules 36 and 42 of the Rules of this Court, for leave to file the attached brief as amicus curiae, suggesting that the decision below should be affirmed.[1]

[1] Pursuant to Rule 36.3 of the Rules of this Court, the Association of Trial Lawyers of America has (continued)

The Association of Trial Lawyers of America is a national bar association comprised of attorneys regularly involved in the trial and appeal of all manner of contested matters. Its membership also includes sitting judges, law professors, lawyer-administrators, and other attorneys. This Association, whose membership now numbers in excess of 40,000, has authorized its participation in this cause as amicus curiae, through its appropriate officers and committees.

In this litigation, this Association seeks to represent the interests of all persons who have been or will be injured, and of the survivors of those who have been or will be killed, as a direct and proximate result of the negligence of others.

The clients regularly represented by the members of this Association include persons injured, and the survivors of persons killed, as a result of the negligence of tortfeasors who are not

---

requested, but has not received, the Petitioner's consent to the filing of the attached brief as amicus curiae. Respondent has consented thereto.

represented for service of process within the jurisdiction, and who are not otherwise easy to locate and/or amenable to service of process. Thus, without statutes such as the one upheld below in this case, many such persons will find themselves without any remedy for the wrong done to them.

For these reasons, and also because of this Association's strong belief in the importance of maintaining the integrity of state legislative enactments, and of decisions regarding their validity by State Courts, this Association considers it important that the decision below be affirmed in this case.

This Association particularly urges the affirmance of the decision below in this case because of the nationwide importance to large numbers of people of upholding statutes such as the one involved here, and of sustaining the integrity of legislative enactments and state court interpretations; the Association's interest also arises from its desire to speak for the many individuals who are or will thus become interested in the outcome of this case.

It is this Association's position that it ill behooves a tortfeasor who has caused injury or death, through its product, service or otherwise, to contend that it should have the benefit of the running of a limitation period during the time when it was not represented within the jurisdiction for service of process, especially where the state legislative scheme, and judicial pronouncements, are otherwise.

This Association also respectfully requests leave, in acordance with Rule 38.7 of the Rules of this Court, to argue orally on the side of Respondents. (Respondents have consented to this application.)

This Association believes that its participation in the argument of this case will enable it to render greater assistance to, and materially aid, this Honorable Court in rendering a just decision on the merits of this appeal.

This Association represents more than 40,000 members directly, and seeks to speak, albeit indirectly, for many more of their clients and of citizens of these United States regarding the important issues raised here. This Association

has attempted to state its positions in its brief as clearly as is possible, consistent with the goal of keeping its brief of reasonable length. Necessarily, written positions cannot substitute for cogent, organized oral explication and, even more importantly, for the availability of counsel at the argument to respond to such questions as may arise. Clearly, written exposition and oral presentation complement each other in the most beneficial ways and this Association prays this Honorable Court to permit it both in this cause.

Wherefore, the Association of Trial Lawyers of America prays that this Honorable Court grant its motion to file its brief amicus curiae and to argue orally on the side of Respondents herein.

Respectfully submitted,

KRONISCH & SCHKEEPER
A Professional Corporation
Attorneys for Amicus Curiae
the Association of Trial
Lawyers of America
139 E. McClellan Avenue
Livingston, New Jersey 07039
(201) 994-1016

On the Brief

ARTHUR IAN MILTZ, ESQ.

Of Counsel

Richard F. Gerry, Esq.
President, The Association of
Trial Lawyers of America
110 Laurel Street
San Diego, California 92101
(714) 238-1811

DATED: September 17, 1981

No. 80-644

In The

Supreme Court of the United States

OCTOBER TERM, 1980

G. D. SEARLE & CO.,
Petitioner,

-vs-

SUSAN COHN AND WALTER COHN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of the Association of Trial Lawyers of America ("ATLA") is set forth in the accompanying motion for leave to file this brief as amicus curiae in support of the position taken by Respondents Susan Cohn and Walter Cohn.

SUMMARY OF ARGUMENT

The within appeal concerns the constitutionality of N.J.S.A. 2A:14-22 ("New Jersey tolling

statute"). ATLA endorses in full the arguments advanced by Respondents to the effect that New Jersey's tolling statute does not violate the Equal Protection, Due Process nor Commerce Clauses. The purpose in filing this amicus brief is to complement the brief filed by Respondents by stressing certain basic tenets of law as they relate to the constitutional challenges to the New Jersey tolling statute.

A basic principle of statutory construction particularly relevant herein holds that the construction of a state statute by the highest court of that state is binding upon the United States Supreme Court. **Brown v. Ohio, 432 U.S. 161, 167, 53 L.Ed. 2d 187, 195, 97 S.Ct. 2221 (1977); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837, 56 L.Ed. 2d 1, 9, 98 S.Ct. 1535 (1978).**

Of further relevance is the consistently liberal construction given to statutes of limitation by the New Jersey courts. Preserving a plaintiff's right to have his cause of action determined on the merits has resulted in liberal interpretation of New Jersey statutes of limitation.

Galligan v. Westfield Centre Service, Inc., 82 N.J. 188 (1980); Velmohos v. Maren Engineering Corp., 83 N.J. 282, 293 (1980). The New Jersey Supreme Court followed this basic rule of liberal statutory construction in **Velmohos** and found (a) a foreign corporation amenable to New Jersey's long-arm jurisdiction was not represented in New Jersey and was therefore subject to the tolling statute; and (b) in order to become "represented" in New Jersey a foreign corporation must merely designate an agent for service of process within the state.

Keeping in mind the foregoing statutory construction by the New Jersey Supreme Court in **Velmohos**, we turn to the constitutional arguments raised by Petitioner G.D. Searle ("Searle"). First, it is hornbook law that the New Jersey tolling statute is entitled to a strong presumption of validity. **McGowan v. Maryland, 366 U.S. 420, 6 L.Ed. 2d 393, 81 S.Ct. 1101 (1961).** The burden of proving that the statute is invalid is clearly on the challenging party. **Morey v. Doud, 354 U.S. 457, 1 L.Ed. 2d 1485, 77 S.Ct. 1344 (1957).**

ATLA submits that a thorough analysis of the Due Process, Equal Protection and Commerce Clause arguments raised by Petitioner indicates that they are without merit. First, it is clear that the classification drawn by the New Jersey tolling statute, between foreign corporations who are "represented" within New Jersey and those who are not, rationally furthers at least two legitimate state purposes. Tolling of the statute of limitations gives New Jersey plaintiffs additional time to identify and locate foreign defendants. It also recognizes the significant difference in effecting service of process on a corporation represented in the State of New Jersey compared to effecting long-arm service by any method upon an unrepresented foreign corporation. The tolling statute violates neither the Due Process nor Equal Protection Clauses.

Equally evident is the fact that **N.J.S.A. 2A:14-22** does not violate the Commerce Clause. The tolling statute creates no undue burden on interstate commerce. It is clear that the statute as construed by the New Jersey Supreme Court in **Velmohos, supra,** does not prevent any corporation

from engaging in commerce within the state nor from defending or maintaining an action in New Jersey. N.J.S.A 14A:13-3(2)(a); N.J.S.A. 14A:13-11(2).

ARGUMENT

POINT I

THE CONSTRUCTION GIVEN TO N.J.S.A. 2A:14-22 BY THE NEW JERSEY SUPREME COURT IN VELMOHOS IS BINDING UPON THIS COURT.

Prior to addressing the issue of the constitutionality of the state statute in question, **N.J.S.A. 2A:14-22**, ATLA submits that it is necessary to be mindful of certain basic concepts of statutory construction.

A. The Construction Of A State Statute By The State's Highest Court Is Binding Upon The United States Supreme Court.

It is an elemental principle of Supreme Court review of state statutes that the construction given to a legislative enactment by the state's highest court is binding upon the United States Supreme Court. **Brown v. Ohio, supra; Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674, 49 L.Ed. 2d 132, 138, 96 S.Ct. 2358 (1976); Grayned v. City of Rockford, 408 U.S. 104, 110, 33 L.Ed. 2d 222, 228, 92 S.Ct. 2294 (1972).**

It is clearly not the function of the United States Supreme Court to construe a state statute

contrary to the interpretation given to it by the state's highest tribunal. O'Brien v. Skinner, 414 U.S. 524, 531, 38 L.Ed 2d 702, 94 S.Ct. 740 (1974); Landmark Communications, Inc. v. Virginia, supra. Rather, the Supreme Court is to consider the state's highest court's interpretation as though it was written into the statute itself by the state legislature. Winters v. New York, 333 U.S. 507, 514, 92 L.Ed. 840, 68 S.Ct. 665 (1948); Poulos v. New Hampshire, 345 U.S. 395, 402, 97 L.Ed. 1105, 73 S.Ct. 760, 30 ALR 2d 987 (1953); Bellotti v. Baird, 443 U.S. 662, 61 L.Ed. 2d 797, 99 S.Ct. 3035 (1979), reh den. 62 L.Ed. 2d 121, 100 S.Ct. 185 (1979).

The aforementioned general rules of Supreme Court review of statutory construction apply with equal force to review of state statutes of limitation. Moore v. Illinois C.R. Co., 312 U.S. 630, 634, 85 L.Ed. 1089, 61 S.Ct. 754 (1941); Standard Oil Co. v. Tennessee ex rel. Cates, 217 U.S. 413, 422, 54 L.Ed. 817, 30 S.Ct. 543 (1910); Tioga R. Co. v. Blossburg & C.R. Co., 20 Wall 137, 22 L.Ed. 331 (1873) (holding that the construction of the New York tolling statute by the

highest court of New York is binding upon the Supreme Court.)

B. Statutes of Limitations Are Liberally Construed In New Jersey In Order To Preserve Parties Opportunities To Litigate Claims On The Merits.

New Jersey courts have consistently attempted to preserve plaintiffs' opportunities to have actions determined on the merits by liberally construing statutes of limitation. **Velmohos v. Maren Engineering Corp., supra; Galligan v. Westfield Centre Service, Inc., supra; Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329, 338 (1978); White v. Violent Crimes Compensation Board, 76 N.J. 368, 379 (1978).**

This is in keeping with the basic tenet of law in New Jersey and throughout the United States that defendants have no fundamental right to protection of statutes of limitation, which are by definition arbitrary and subject to a large degree of legislative control. **Rosenberg v. Town of North Bergen, 61 N.J. 190 (1972); Campbell v. Holt, 115 U.S. 620, 29 L.Ed. 483, 6 S.Ct. 209 (1885); Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314, 89 L.Ed. 1628, 65 S.Ct. 1137 (1945);**

Hopkins v. Kelsey-Hayes, Inc. 628 F.2d 801, 809 (3d Cir. 1980).

The New Jersey Supreme Court followed this elemental principle in Velmohos by liberally construing the tolling statute in question. First, the Court found that a foreign corporation which was amenable to New Jersey's long-arm jurisdiction was not thereby "represented" in New Jersey under N.J.S.A. 2A:14-22. Rather, the foreign corporation unrepresented in New Jersey but subject to long-arm service was subject to the tolling statute. 83 N.J. at 287, 288, 291. Second, New Jersey's highest tribunal found that in order to be "represented" under N.J.S.A. 2A:14-22, a foreign corporation must merely designate an agent for service of process within the State of New Jersey. Id. at 293, 296. Representation does not require a foreign corporation to file a certificate of authority under N.J.S.A. 14A:13-11.

While this Court is bound by this statutory construction regarding what is necessary for a foreign corporation to be "represented" in New Jersey, it is also evident that this statutory interpretation is entirely consistent with New Jersey

statutes, rules and case law. That is, designation of an agent for service of process pursuant to N.J.S.A. 2A:14-22 and N.J.Ct.R. 4:4-4(c)(1) does not require a foreign corporation not transacting business in New Jersey to file a certificate of authority under N.J.S.A. 14A:13-4. In fact, foreign corporations not transacting business are specifically permitted to defend any action or proceeding filed in any court in New Jersey. N.J.S.A. 14A:13-11(2); Bozzuto's Inc. v. Frank Kantrowitz & Sons, Inc., 117 N.J. Super. 146, 283 A.2d 907, 908 (App. Div. 1971). It is equally clear that foreign corporations not transacting business in New Jersey need not file a certificate of authority in order to affirmatively bring suit in the state courts. N.J.S.A. 14:13-3(2)(a); Eli Lilly & Co. v. Sav-On Drugs, Inc., 366 U.S. 276, 6 L.Ed. 2d 288, 81 S.Ct. 1316 (1961); Gulf Chemical & Metal Corp. v. Sylvan Chem. Corp., 122 N.J. Super. 499, 300 A.2d 878 (Law Div. 1973); aff'd 126 N.J. Super. 261, 314 A.2d 73 (App. Div. 1973).

The foregoing review of the statutory construction by the New Jersey Supreme Court in

Velmohos serves as the basis for an examination of the constitutionality of **N.J.S.A. 2A:14-22.**

POINT II

THE NEW JERSEY TOLLING STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION, DUE PROCESS OR COMMERCE CLAUSES.

ATLA adopts in full the arguments raised by Respondents Cohn in opposition to Petitioner Searle's contention that **N.J.S.A. 2A:14-22** violates the Equal Protection, Due Process and Commerce Clauses of the Constitution. Amicus, in support of and as a supplement to Respondents' position, respectfully asserts the following.

A. The New Jersey Tolling Statute Is Entitled To A Strong Presumption Of Validity.

It is a basic principle of constitutional law that the New Jersey Tolling Statute, like any other legislative enactment, is presumptively valid. **Lockport v. Citizens for Community Action, 430 U.S. 259, 51 L.Ed. 2d 313, 97 S.Ct. 1047 (1977); Lindsey v. Normet, 405 U.S. 56, 71, 31 L.Ed. 2d 36, 49, 92 S.Ct. 862 (1972); McGowan v. Maryland, supra; Davies Warehouse Co. v. Bowles, 321 U.S. 144, 88 L.Ed. 635, 64 S.Ct. 474 (1944).** The heavy burden of explicitly demon-

strating the constitutional infirmity of the state statute is on the party challenging the legislative enactment. **San Antonio Independent School Dist. v. Rodriguez**, 411 U.S. 1, 36 L.Ed. 2d 16, 93 S.Ct. 1278 (1973); **Morey v. Doud**, supra; **Velmohos**, supra at 295.

B. The New Jersey Tolling Statute Does Not Deny Equal Protection Or Due Process Of Law To Unrepresented Foreign Corporations.

The issue presented by Petitioner is whether the classification drawn by the New Jersey tolling statute between foreign corporations who are "represented" within the State for purposes of service of process and those who are not "represented" lacks a rational basis and therefore violates their right to due process and equal protection under the United States Constitution.

As Petitioner Searle conceded below, the availability of the defense of the statute of limitation is not a fundamental right or privilege. This Court has so held in **Chase Securities Corp. v. Donaldson**, supra which reaffirmed the holding of **Campbell v. Holt**, supra that a repeal of the statute of limitation, reviving a creditor's right of action on a debt, does not deprive the debtor

of property without due process. The Court, in an opinion by Justice Jackson, stated as follows:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost...They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable [sic] and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual [emphasis supplied]. He may, of course, have the protection of the policy while it exists but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control. 325 U.S. at 314 (citations & footnote omitted).

Because no fundamental right is implicated, review of the statutory classification would not require strict scrutiny [see Scherling v. Superior Court of Santa Clara County, 22 Cal. 3d. 493, 149

Cal. Rptr. 597, 602-03 (1978) (applying rational relationship standard of review in upholding statute tolling statute of limitation during criminal defendant's absence from state)] but merely a determination of whether "any state of facts reasonably may be conceived to justify it." Metropolitan Casualty Insurance Co. v. Brownell, 294 U.S. 580, 584 (1935).

New Jersey's denial of the Statute of Limitation to unrepresented foreign corporations does not even begin to "approach sensitive and fundamental personal rights" so as to trigger the application of the intermediate or middle tier level of scrutiny, which has been utilized by the Court in cases involving discrimination based upon gender or illegitimacy. See Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972) (illegitimacy); Craig v. Boren, 429 U.S. 190, 210 (1976) (gender) (Powell, J., concurring). Thus, the applicable standard of review is not whether the statutory classification bears a "fair and substantial relation" to the stated object of the legislation [see Reed v. Reed, 404 U.S. 71, 76 (1971) (gender discrimination), citing F.S.

Royster Guano Co. v. Virginia, 253 U.S. 412, 416 (1920)], but rather whether the classification bears some rational relationship to legitimate state purpose. Weber, supra, 406 U.S. at 172. Williamson v. Lee Optical Co., 348 U.S. 483, 487-488 (1955).

Moreover, the Third Circuit correctly decided that the classification drawn by the New Jersey tolling statute between represented and unrepresented foreign corporations rationally furthers at least two legitimate state purposes. First, because an out-of-state corporation which has a local agent is much easier to identify and locate, the New Jersey legislature could have reasonably concluded that tolling the statute of limitation in favor of plaintiffs suing unrepresented corporations in New Jersey courts was necessary in order to give such plaintiffs additional time to identify and locate their defendants. Also, the New Jersey Court Rules make a real and substantial distinction between service of process on a locally represented corporation and long-arm service upon an unrepresented out-of-state corporation.

While service can be made under New Jersey Court Rule 4:4-4(c)(1) upon a corporation "by serving...the person at the registered office of the corporation in charge thereof," long-arm service upon an unrepresented foreign corporation requires that: (1) an attempt be made to serve the corporation within the state; (2) an affidavit be filed by the plaintiff's attorney "that after diligent inquiry and effort personal service cannot be made" within the state; and (3) a showing be made that service by mail upon the corporation will be "consistent with due process of law." Because of these additional burdens upon a plaintiff seeking to obtain long-arm service upon an unrepresented foreign corporation, the state legislature rationally concluded that tolling the statute of limitation in favor of such plaintiffs would give them the additional time needed to effect service and thereby eliminate the injustices that might otherwise result.

The Third Circuit, in upholding the distinction made by the New Jersey tolling statute against equal protection and due process attack, expressly followed the New Jersey Supreme Court's

decision on the exact same question in **Velmohos, supra.** Both the Third Circuit and New Jersey decisions are also in accord with the holdings and dicta in other courts of appeal and state high court decisions on similar issues. See **Zalatuka v. Metropolitan Life Insurance Co., 90 F.2d 230 (7th Cir. 1937)** (dicta) (state legislature may distinguish between domestic and foreign insurance companies for purposes of determining time within which suits on insurance policies may be instituted or be forever barred); **Dew v. Appleberry, 23 Cal.3d. 637, 153 Cal.Rptr. 219, 223 (1979)** (statute tolling statutes of limitation with defendant absent from state did not penalize exercise of fundamental right and was rationally related to alleviating "any hardship that would result by compelling plaintiff to pursue defendant out of state"); **Vaughn v. Deitz, 430 S.W. 2d. 487, 490 (Tex. 1968)** (upholding statutes of limitation while defendant was absent from state since distance of defendant from state may make it more expensive and difficult for plaintiff to locate defendant for purpose of effecting service of process by mail). Finally, this Court has upheld,

against an equal protection attack, an Indiana statute which prohibited foreign casualty insurance companies from limiting by agreement to less than three years the time within which a suit could be brought against them on their indemnity policies while permitting domestic casualty insurance companies to contract for any reasonable limitation period. **Metropolitan Casualty Insurance Co. v. Brownell, supra, 294 U.S. at 580-81.**

In **Clark v. Gulesian, 429 F.2d 405 (1st Cir. 1970), cert. denied, 400 U.S. 993 (1971),** application of Maine decisions rejecting the adoption of the "discovery" rule barred the plaintiff from maintaining a medical malpractice action even though the plaintiff did not learn of the defendant doctor's negligence until a second operation in 1969 revealed that a towel had been left inside the plaintiff's body during initial surgical treatment in 1952. In holding that the Maine statute of limitation as interpreted and applied by the Maine decisions was not unconstitutional as a denial of due process or equal protection, the First Circuit emphasized that Maine's rejec-

tion of the discovery rules was a "policy decision" and reasoned as follows:

> Unfortunate as the present result may be for the plaintiff, the state may reasonably recognize that a defendant has an interest in repose and in the avoidance of stale claims, however free of fault the claimant's delay may be. **429 F.2d at 406.** Accord, **Pittman v. United States, 341 F.2d 739, 741 (9th Cir.), cert. denied, 382 U.S. 941 (1965).**

Similarly, New Jersey's decision to toll the statutes of limitation in suits against nonresident unrepresented corporations was a policy decision; the fact that Petitioner may not have contributed to any delay in the filing of the action in the case at bar (and indeed may in fact have been amenable to long-arm service of process) does not preclude the state from reasonably concluding that plaintiffs in suits against unrepresented foreign corporations should generally have the benefit of additional time in which to locate and effect service of process upon their defendants.

C. The New Jersey Tolling Statute Does Not Violate The Commerce Clause.

The Commerce Clause does not by its terms

prohibit all State exercises of the Police Power which affect interstate commerce. Unless the statute in question creates an undue or discriminatory burden, it is valid. **Breard v. City of Alexandria, La., 341 U.S. 622, 95 L.Ed. 1233, 71 S.Ct. 920 (1951), reh den 342 U.S. 843, 96 L.Ed. 637, 72 S.Ct. 21 (1951).**

The New Jersey tolling statute does not create an undue burden on interstate commerce. No corporation is prevented from engaging in commerce within the state. No corporation is prevented from enforcing its rights or claims in the New Jersey Courts. Based upon the interpretation given to the statute in question by the New Jersey Supreme Court in **Velmohos, supra,** it is patently clear that no burdens on interstate commerce are present.

It is evident that foreign corporations doing business within the state must obtain a certificate of authority in accordance with **N.J.S.A. 14A:13-3.** The same statute, however, specifically states that it "shall not [emphasis supplied] be considered to be transacting business in this state,...by reason of...main-

taining, defending, or otherwise participating in any action or proceeding, whether judicial, administrative, arbitrative or otherwise, or affecting the settlement thereof or the settlement of claims or disputes..." Thus, the foreign corporation engaged solely in interstate commerce may either commence or defend any action without obtaining a certificate of authority.

The foreign corporation can be "represented" in New Jersey, enabling it to utilize the privilege of the statute of limitation and eliminate possible continued exposure to suit created by the tolling statute, simply "by the designation of an agent for service of process within the state." **Velmohos, supra at 293.** No certificate of authority need be obtained.

If the New Jersey Supreme Court had concluded that a foreign corporation would have to obtain a certificate of authority to be "represented" in the state, they would have so stated in **Velmohos, supra.** They did not. To suggest, as Petitioner Searle does, that a certificate of authority is required in order to avoid the effects of the tolling statute on a foreign

corporation is an invitation to this Court to construe the tolling statute differently from the interpretation given by New Jersey's highest court. ATLA respectfully submits that this Court does not have the right, or the power, to accept Petitioner's invitation. See Point I, supra.

It is patent that the tolling statute's only requirement for a foreign corporation is to designate an agent for service of process. Far from an attempt by the New Jersey legislature to burden interstate commerce, the tolling statute is a legitimate legislative attempt to ensure that litigants in the New Jersey Courts will not be prejudiced by an inability to locate a foreign corporation. Without the benefit of the statute as interpreted by the New Jersey Supreme Court in **Velmohos**, a plaintiff could have a claim barred by the statute of limitation due to his inability to locate a foreign corporation not represented in New Jersey.

Contrary to Petitioner's claim, corporations falling under the purview of the tolling statute are not unprotected. **Velmohos, supra at 293,** makes it clear that the defense of laches is

always available. Also, the statute of limitation will commence running on any claim as soon as the corporation becomes represented in New Jersey. It is clear that the tolling statute does not create the unlimited open-ended liability Petitioner contends. In fact, the statute is a very limited enactment to protect claims from being unfairly barred. There is no undue or discriminatory burden created.

CONCLUSION

Based upon the foregoing, ATLA respectfully submits that this Court should affirm the decision below.

Respectfully submitted,

KRONISCH & SCHKEEPER
A Professional Corporation
Attorneys for Amicus Curiae
the Association of Trial
Lawyers of America
139 E. McClellan Avenue
Livingston, New Jersey
07039
(201) 994-1016

On The Brief

ARTHUR IAN MILTZ, ESQ.

Of Counsel

Richard F. Gerry, Esq.
President, The Association of Trial
Lawyers of America
110 Laurel Street
San Diego, California 92101
(714) 238-1811

DATED: September 17, 1981